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**THE RELATIONSHIP BETWEEN INTERNATIONAL LAW AND
SCOTS CRIMINAL LAW UNDER REFERENCE TO
EXTRADITION, MUTUAL LEGAL ASSISTANCE AND PROCEEDS
OF CRIME**

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This thesis has been composed by me and the work is my own.

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The relationship between international law and Scots criminal law is largely unexamined. The thesis addresses that by examination of the principal preoccupations of UK international criminal justice policy since the mid 1980s-extradition, mutual legal assistance and proceeds of crime.

A theoretical foundation is laid, noting that treaties require legislative transformation before they take effect in municipal law (other than as interpretative tools in limited circumstances). Criminal courts have, however, not always applied that theory rigorously. Nor have they handled treaty interpretation well.

Anglocentricity pervades UK extradition law and, notwithstanding the reform of the law in 1988 and 1989, both municipal law and the UK's international arrangements remain in some respects a poor fit with Scots law. Issues arising from that are explored. It is noted that further development is likely to occur in the context of the Third Pillar of the EU. More generally, it is demonstrated that the Extradition Act 1989 entrenches the dominance of municipal law. Furthermore, courts tend to apply concepts drawn from more general municipal law to the determination of extradition law questions. These (and other) factors justify the view that municipal law has priority in the UK's approach to extradition; though obligations under ECHR may in some circumstances take precedence. Indeed, those obligations sometimes conflict with obligations under extradition treaties.

Mutual legal assistance has a much smaller literature than extradition and is therefore analysed more comprehensively in the thesis. The pattern of municipal law priority is repeated; but it becomes clear that policy makers have not always demonstrated a firm grasp of the principles of municipal law to which they have sought to give such priority.

The writer has previously published a detailed analysis of proceeds of crime law and comprehensive analysis is not, therefore, required in the thesis. The development of the law is described and it is shown that municipal law and international law have developed in parallel. The influence which international law has exerted on municipal law has been limited.

Ultimately, 2 conclusions are drawn. The first is that the relationship between international law and Scots law is not merely unexplored. It is also underdeveloped. The second is that the relationship depends substantially upon the varying policy priorities of UK governments.

WORD COUNT

The Faculty Postgraduate Studies Committee granted an extension of the word limit to a total of 120,000. The final word count, including footnotes but excluding contents page, table of abbreviations and bibliography, is 117,159. Excluding the footnotes, the word count is 99,254.

Abbreviations

The following are the principal abbreviations used in this thesis:

1870 Act	Extradition Act 1870.
1965 Act	Backing of Warrants (Republic of Ireland) Act 1965.
1969 Vienna Convention	Vienna Convention on the Law of Treaties 1969.
1974 Working Party Report	<i>Report of the Working Party on The Extradition Act 1870</i> , 1974.
1982 Working Party	Interdepartmental Working Party on Extradition 1982.
1987 Act	Criminal Justice (Scotland) Act 1987.
1988 Act	Criminal Justice Act 1988.
1988 UN Drugs Convention	United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988.
1989 Act	Extradition Act 1989.
1990 Act	Criminal Justice (International Co-operation) Act 1990.
1992 Consultation Paper	HM Treasury, <i>Implementation of the EC Money Laundering Directive</i> , 1992.
1995 Act	Proceeds of Crime (Scotland) Act 1995.
CDPC	European Committee on Crime Problems (Council of Europe).
Commonwealth Rendition Scheme	Commonwealth Scheme for the Rendition of Fugitive Offenders.

Confiscation Order	According to context, the Confiscation of the Proceeds of Crime (Designated Countries and Territories) (Scotland) Order 1999 or an order made by a court for the confiscation of the proceeds of crime.
(Consolidation) Act	Criminal Law (Consolidation) (Scotland) Act 1995.
DTOA	Drug Trafficking Offences Act 1986.
ECE	European Convention on Extradition 1957.
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (European Convention on Human Rights).
ECJ	European Court of Justice.
EComHR	European Commission of Human Rights.
ECtHR	European Court of Human Rights.
ECMA	European Convention on Mutual Assistance in Criminal Matters 1959.
Europol Convention	European Union Convention on the Establishment of a European Police Office 1995.
FATF	Financial Action Task Force.
Forfeiture Order	Criminal Justice (International Co-operation) Act 1990 (Enforcement of Overseas Forfeiture Orders) (Scotland) Order 1999.
Harare Scheme	Commonwealth Scheme for Mutual Assistance in Criminal Matters.
HRA	Human Rights Act 1998.

ICCPR	International Covenant on Civil and Political Rights 1976.
Laundering Convention	Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime 1990.
Maastricht Treaty	Treaty on European Union 1992.
MLAT	Mutual Legal Assistance Treaty.
PACE	Police and Criminal Evidence Act 1984.
PC-OC Memorandum	Council of Europe Secretariat Memorandum PC-OC (91)1.
RCMP	Royal Canadian Mounted Police.
SLC	Scottish Law Commission.
SLC Report	Scottish Law Commission <i>Report on Confiscation and Forfeiture</i> (Scot Law Com No 147).
TEU	Treaty on European Union 1992.

1. INTRODUCTION

Introduction

That transnational crime is of increasing importance has not been a novel proposition for over a century. As long ago as 1874, Clarke was able to write that "the complexity of business transactions, the vast extension of credit, the general use of paper money of various kinds, all make it easy for a modern criminal to commit a fraud which may cause far more widespread misery than a similar act could formerly have produced, and to insure at least a few hours concealment of his guilt. And other improvements-the use of steam, the multiplication of means of locomotion-make it easy for him in those few hours to effect his escape to a foreign country"¹. In an introduction to a German legal text-book published in 1893, von Liszt made a similar point, writing that "...the professional thief or swindler feels equally at home in Paris, Vienna or London...counterfeit roubles are produced in France or England and passed in Germany...gangs of criminals operate continuously over several countries"².

At the end of the twentieth century such words are as true as ever. Substitute a reference to the electronic transfer of funds for that to paper money, replace "steam" with "air travel" and either comment could have been made by a modern commentator. In December 1989, Earl Ferrers, the Home Office Minister of State, opened the Second Reading debate on the Bill which became the Criminal Justice (International Co-operation) Act 1990 ("the 1990 Act") with the words "the criminal fraternity has realised that the ability to hop from state to state and to operate across national boundaries can be turned to its advantage...Today's criminals can fly...to most places in a matter of hours"³.

In the last 150 years or so there has been a series of developments by which states have sought to respond to and cope with the increasing

¹ E Clarke, *A Treatise upon The Law of Extradition*, Stevens and Haynes, 1874, 12.

²F Von Liszt, quoted without more precise reference in F Bresler, *Interpol*, Sinclair Stevenson, 1992, 11.

³HL Debs Vol 513, 12 December 1989, col 1214.

internationalisation of crime. These developments have been sporadic and not always well co-ordinated. International criminal law norms have "originated in diverse sources and developed unsystematically over time...[They]...are neither uniform nor consistent in application and often vary greatly as regards source of law, form and legal status"⁴.

Such efforts began in earnest with the agreement of a scattering of extradition treaties in the nineteenth century⁵ and continued with the development of police co-operation (especially the creation of Interpol in 1923) and of mutual legal assistance mechanisms such as the European Convention on Mutual Assistance in Criminal Matters 1959 ("ECMA"). They have, in the last two to three decades in particular, resulted in a wide range of instruments designed to attack aspects of transnational crime⁶. Some have been multilateral, within the framework of the United Nations or Council of Europe, reflecting to some extent the increasing "consensus according to which respect for certain fundamental values is not to be left to the free disposition of States individually but is recognised and sanctioned by international law as a matter of concern to all States"⁷. One might cite as examples of this the fact that in 1996, after half a century, the International Law Commission was finally able to adopt its Draft Code of Crimes Against the Peace and Security of Mankind⁸ and the adoption, on

⁴Lyal S Sunga, *The Emerging System of International Criminal Law*, Kluwer, 1997, 2.

⁵There are, of course, some earlier instruments, such as the Treaty between the Netherlands and Great Britain for the Suppression of the Slave Trade 1818.

⁶There were in 1991, according to Bassiouni, "315 international instruments, elaborated mostly on an *ad hoc* basis between 1815 and 1988, which cover 22 categories of offences" (M Cherif Bassiouni, "Policy Considerations on Inter-State Co-operation", in A Eser, and O Lagodny, *Principles and Procedures for a New Transnational Criminal Law*, Society for the Reform of Criminal Law and Max Planck Institute for Foreign and International Criminal Law, 1992, 807).

⁷Bruno Simma, "From Bilateralism to Community Interest in International Law", 1994 *Hague Recueil* 221, 233. This does not imply uncritical acceptance of the hypothesis of a international *civitas maxima*. That hypothesis faces serious objections (see Harman van der Wilt, "The Political Offence Exception in Extradition Law: An Antidote to Prefixed Ideas about Political Integration in Europe" (1997) 4 MJ 25, 46).

⁸See *Report of the International Law Commission on Its Forty-eighth Session*, UN GAOR, 51st Session, Supp No 10, UN Doc A/51/10 (1996). For analysis, see Timothy LH McCormack and Gerry J Simpson, "The International Law Commission's Draft Code of Crimes against the Peace and Security of Mankind: An Appraisal of the Substantive Provisions" 5 *Criminal Law Forum* 1 (1994); and Rosemary Rayfuse, "The Draft Code of Crimes against the Peace and Security of

17 July 1998, of the Rome Statute of the International Criminal Court⁹. Others have been bilateral, reflecting not only the greater ease of reaching agreement when only two legal systems are engaged¹⁰ but also the policy preference of certain states (including in particular the USA¹¹) and the underlying bilateralism of traditional international law¹². Since 1992 and the Treaty on European Union ("TEU"), the so-called "Third Pillar" of the European Union has provided a further framework for multilateral agreements at a sub-regional level¹³. Indeed, Denza has suggested that TEU marked the beginning of the reversal of the process of divergence which was going on as between European Community law and international law¹⁴; and we shall certainly come across examples of First Pillar initiatives bearing on our subject in this thesis.

As a result of the efforts made by international law and municipal criminal law to address the problems of international crimes, transnational crime and fugitive offenders, Bassiouni and Wise have gone so far as to maintain that there now exists "a true body of international criminal law concerned...with the repression of conduct perceived to be harmful to the interests of the international

Mankind: Eating Disorders at the International Law Commission" 8 *Criminal Law Forum* 43 (1997).

⁹ UN Doc A/CONF.183/9.

¹⁰ There is, however, a mathematical disadvantage inherent in bilateralism. It has been calculated that if all of the UN member States were to base their international co-operation in criminal matters on bilateral treaties 14356 separate treaties would be required (W Schomburg, "The Regionalisation of International Criminal Law and the Protection of Human Rights in International Co-operation in Criminal Proceedings; Section IV of the XV Congress of the International Association of Penal Law, IAPL" 1995 *European Journal of Crime, Criminal Law and Criminal Justice* 98).

¹¹ See P Robinson, "Treaty Negotiation, Drafting, Ratification and Accession by Caricom States" 18 *West Indian Law Journal* 1 (1993). The US preference is said to be based partly on geographical factors (Schomburg, *op cit*).

¹² See Bruno Simma, *op cit*, 230.

¹³ These include the Convention relating to Extradition between the Member States of the European Union (OJ 96/C 313/02), the Convention on the Protection of the European Communities' Financial Interests (OJ 95/C 316/03) and its Protocol (OJ 96/C 313/01), the Convention on the establishment of a European Police Office (OJ 95/C 316/01) and the Convention on simplified extradition procedure between the Member States of the European Union (OJ 95/C 78/01). For a description of the Third Pillar arrangements, see 85 below.

¹⁴ Eileen Denza, "Two Legal Orders: Divergent or Convergent?" (1999) 48 *ICLQ* 257, 270.

community as a whole" and analogous to domestic criminal law¹⁵. This, Bassiouni says, is "...a product of the convergence of two different legal disciplines which have emerged and developed along different paths to become complementary and co-extensive. They are: the criminal law aspects of international law and the international law aspects of national criminal law"¹⁶. In similar vein, Haentjens and Swart have written (in a criminal law context) of a developing "osmosis between international law and domestic law"¹⁷.

It is surprising, therefore, that, although the relationship between international law and municipal law in general is well trodden ground, the relationship between international law and criminal law in particular has until recently received relatively little attention from scholars. Nadelmann has said that "...US foreign policy and criminal justice...have had remarkably little to do with one another. The vast majority of criminal justice scholars have extended their attention no further than their nations' borders...Among students of US foreign policy...almost no-one has paid much attention to issues of crime and law enforcement... Whatever arguments might once have justified this disengagement of the two disciplines can no longer be sustained. The interpenetration of foreign policy and criminal justice institutions and concerns have simply become too substantial to be ignored by scholars any longer"¹⁸.

International law and Scottish criminal law

What Nadelmann wrote about the USA could be written with equal force about Scotland. The relationship between international law and Scots criminal law

¹⁵ M Cherif Bassiouni and Edward M Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law*, Martinus Nijhoff Publishers, 1995, ix.

¹⁶ MC Bassiouni, *Characteristics of International Criminal Law Conventions* (in MC Bassiouni, (ed), *International Criminal Law: 1 Crimes* Transnational Publishers, 1986) 1.

¹⁷ Rijnhard Haentjens and Bert Swart, "Substantive Criminal Law" in Bert Swart and André Klip (eds), *International Criminal Law in the Netherlands*, Max Planck Institut, 1997, 28.

¹⁸ EA Nadelmann, *Cops Across Borders: The Internationalization of US Criminal Law Enforcement* Pennsylvania State University Press, 1993, xiii. A similar observation was made by Currie, who wrote "...criminal cases having foreign aspects tend to fall between two stools, in the academic world at least." (B Currie, *Selected Essays on the Conflict of Laws*, 1963, quoted in JJ Murphy, "Revising Domestic Extradition Law" 131 *University of Pennsylvania Law Review* 1063, 1065 (1983)).

remains largely unexamined. Published analysis of the UK's international criminal law arrangements from a Scots law perspective is limited¹⁹, as is analysis of the legislation applicable in Scotland which forms the domestic counterpart to such international arrangements. It is the business of this thesis to begin to remedy that state of affairs; but the endeavour confronts us with two immediate difficulties.

The first is that there is a paucity of Scottish case-law on international criminal law matters. For geographical reasons (Scotland is not really en route to anywhere and London is a much more significant financial centre than any Scottish city), Scotland is not a very obvious place for the transnational criminal to include in his itinerary. The opportunities for Scottish courts to consider issues of international criminal law have therefore been much more restricted than have been those enjoyed by the English courts. Such opportunities have been further restricted because the Extradition Act 1870 ("the 1870 Act"), which for most of the 20th Century has provided the context for consideration of international criminal law issues by UK courts, in most cases effectively denied the Scottish courts jurisdiction even over fugitives arrested in Scotland²⁰.

A shortage of writing and a shortage of case-law means that much of the analysis of legislation will have to proceed from first principles; but not exclusively so. We can draw on literature from other jurisdictions and in particular we can make use of the literature and cases of English law, which shares many of the relevant legislative provisions with Scotland or has very close equivalents. Indeed, such international criminal law treaties as have been incorporated into UK law have typically been so incorporated in legislation which has been drafted first in English legal categories and then "translated" (not always very well) into Scots law²¹, so that when one looks at the English case law on that

¹⁹The *Juridical Review Centenary Index*, for example, lists only 2 articles in that journal on extradition between 1889 and 1988.

²⁰ See 36 below.

²¹ One does not, of course, have to approve of this approach to legislating: the writer agrees with much of what is contained in W Finnie, "International Co-operation Against Crime and Scots

legislation, one looks at the case law of the legal system under reference to which the legislation was originally drafted. That is obviously likely to be helpful in understanding the intention of the draftsman. Moreover, the relationship between Scots law and international law is carried on by proxy. In international fora the UK speaks with a single voice and that voice is rarely well informed about Scots law. There was, for example, no Scottish representation on the UK delegation at the 1988 United Nations Conference to adopt the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances¹⁹⁸⁸ ("the 1988 UN Drugs Convention") (by any measure, one of the most important international instruments dealing with criminal law matters to have been developed in the last 50 years²²). The fact that the treaties with which we will be concerned have been negotiated under primary reference to English law reinforces the need to take account of English case-law in understanding their effect. It also, incidentally, means that the relationship between international law and Scots law tends to be unidirectional. One can identify many examples of changes made to Scots law in order to reflect developments on the international plane. It is, however, hard to identify any examples of Scots law influencing even UK international policy, much less international law.

Accordingly, although this thesis is concerned with international criminal law from a Scots law perspective, extensive use will be made of English law material. This approach is, for a Scots lawyer, counter-intuitive. Farmer has pointed out that "Scottish criminal law has been shaped by its determination to remain independent from its English neighbour", that this determination is particularly evident in criminal matters and that "much of the writing on Scots

Legislation", 1990 SLT (News) 205. See also TB Smith's characteristically pungent observation (after noting the complaints made to the Royal Commission on Scottish Affairs in 1953 about extending English statutes to Scotland by an "application section") that this "causes an intolerable waste of time and effort. It is not possible in the complex conditions of today to ensure that all laws should be drafted so that he who runs may read, but they should not be made more difficult for one sitting in Edinburgh to understand than for one sitting in London..." (TB Smith, *A Short Commentary on the Law of Scotland*, W Green & Son Ltd, 1962, 27).

²²See the analysis in DW Sproule, and P St-Denis, "The UN Drug Trafficking Convention: An Ambitious Step", 1989 *Canadian Yearbook of International Law* 263, 291.

criminal law either assumes or celebrates this difference. It may be expressed in the crude belief that Scottish law is better than English law, or, more usually, in an unreflective separatism that assumes that being Scottish, and a subject of the Scottish legal system, confers certain benefits and that this should not be tampered with or criticised for fear of endangering a hard-won independence"²³. Extensive use of English law material should save this thesis from unreflective separatism but it will also be important to avoid the equal and opposite danger, which is to understate the extent to which the criminal law and criminal justice systems of Scotland and England "still differ markedly"²⁴ and assume that the relationship between international law and Scots criminal law must be much the same as that between international law and English criminal law. The criminal law of Scotland is not merely a variation on English criminal law. Accordingly, its relationship with international law requires to be explored in its own right.

The second difficulty is the sheer size of the field²⁵. An adequate examination of all aspects of international criminal law is impossible in the space available. It is necessary to focus on a smaller area. Even within that smaller area, analysis will require to be highly selective. The thesis will describe the law only to the extent necessary to found analysis of the relationship between international law and criminal law. References to more descriptive texts will be given as appropriate.

The focus of the thesis

International co-operation is arguably the aspect of international criminal law within which international law and national criminal law have had to engage with each other most directly. Writing from an official UK Government perspective in

²³L Farmer, *Criminal law, tradition and legal order: Crime and the genius of Scots law, 1747 to the present*, Cambridge University Press, 1997, 21.

²⁴John Hatchard, Barbara Huber and Richard Vogler, *Comparative Criminal Procedure*, British Institute of International and Comparative Law, 1996, 180.

²⁵See MP Scharf, "Report of the ABA Task Force on Teaching International Criminal Law", 5 *Criminal Law Forum* 91 (1994); and Roger S Clark, "Countering Transnational and International Crime: Defining the Agenda" in Peter J Cullen and William C Gilmore (eds), *Crimes sans*

a paper published in 1992, Harding said that "in the UK perception there are 3 main pillars of international co-operation: extradition (perhaps the oldest of all), general mutual assistance, and co-operation in the confiscation of criminal assets"²⁶. It would be possible to write exclusively about international co-operation and indeed that accounts for a significant part of what follows. Co-operation in the confiscation of criminal assets is, however, only one aspect of the wider subject of proceeds of crime law, which also includes domestic confiscation law and money laundering law. By considering proceeds of crime law as a whole, we have the opportunity to examine the relationship between international law and criminal law as it affects an aspect of substantive law. These 3 subjects-extradition, mutual assistance and proceeds of crime (in the wide sense)-have been the principal (but not the exclusive) preoccupations of UK international criminal law policy since the mid 1980s. They form the focus of our study and, after stating some basic theory, we shall take them in the order just stated. The law is stated according to material available at 1 May 1999.

Frontières: International and European Legal Approaches, Hume Papers on Public Policy (Edinburgh University Press) 1998, 20.

²⁶*Op cit*, 238.

2. SOME THEORY: TREATIES IN DOMESTIC LAW

Introduction

The general theory of the relationship between international law and municipal law is well-trodden ground. That theory must form the starting point for consideration of the relationship as it applies with regard to criminal law in particular.

General Theory

Monism and dualism

It is conventional to analyse legal systems as either dualist or monist in terms of their relationship with international law. Reuter has summarised these two positions by saying that: "Essentially, dualists regard international and municipal law as completely separate, except for the head of State who is the only State organ entitled to represent the State both in municipal and international law. On the other hand, monists hold that municipal law is linked and subject to international law with regard to all State organs"²⁷. To put it another way (albeit over-simply), in a monist system, international law is directly enforceable in municipal courts whereas in a dualist system some act of incorporation into municipal law is required before international rules can be invoked in those courts.

State practice varies considerably²⁸. Wallace and Grant have asserted, without citation of authority, that "[i]n the United Kingdom a "mixed" approach prevails: that is, monistic with regard to customary international law and dualistic in respect of treaty law"²⁹. The assumption which underlies this (and their subsequent discussion) is that Scots law and English law are the same on this issue.

²⁷ P Reuter, *Introduction to the Law of Treaties*, 2nd edition (translated by José Mico and Peter Hagenmacher), Kegan Paul International, 1995, 17.

²⁸ See Sir Robert Jennings and Sir Arthur Watts (eds), *Oppenheim's International Law*, 9th edition, Longman, 1992, i. 54 ("Oppenheim").

²⁹ RMM Wallace and JP Grant, "Public International Law", in *Stair Memorial Encyclopaedia of the Laws of Scotland*, Vol 19, Law Society of Scotland/Butterworths, 1990, para 653.

No-one has seriously challenged the assertion that throughout the UK the relationship between conventional international law and municipal law is essentially a dualist one³⁰. Evans has speculated that differences between Scots law and English law "might be thought to harbour problems in connection with treaties to which the United Kingdom is a party, since at international law the United Kingdom is required to eliminate any divergence between Scots and English law which prevents fulfilment of treaty obligations" but to the limited extent that he develops that thought it is to argue, in effect, that Scots law is more dualist than English law³¹. And Hunt takes the view that the UK's dualism is usually over-stated in theory but does say that the effect at the practical level is to produce "a legal culture of resistance to the use of international law before domestic courts"³². This is consistent with Higgins' observation that where legislation exists bringing a treaty into effect in domestic law, "the court will much prefer to look at the English legal instrument rather than the treaty"³³. Notwithstanding this, however, we shall see that such resistance is not universal. Some judges seem at some times to be willing to find ways of taking more notice of international law than strict theory might suggest they should.

The orthodox (that is, dualist) approach may be justified under reference to constitutional theory, in which treaties are entered into, as all external relations are conducted, under prerogative powers, by the act of the Executive, which does

³⁰ It is difficult to identify any rule of customary international law which bears upon the subject areas under consideration in this thesis (except as regards underlying issues such as the effect of state sovereignty on the investigation of transnational offences). For that reason, the effect of customary international law in Scots municipal law is not discussed in any substantial way here; but the position is stated briefly in this note.

It is clear that customary norms opposable to the UK are *per se* part of English law (*Oppenheim* i 56; *Chung Chi Cheung v The King* [1939] AC 160). Absent authority to the contrary, the position adopted by Wallace and Grant (above, n29) and Gane and Mackarel (Christopher Gane and Mark Mackarel, *Human Rights and the Administration of Justice*, International Bar Association/Kluwer, 1997, xvi), which makes no distinction between Scots and English law, is probably correct. It would be unsatisfactory if the parts of a unitary state like the UK observed different rules on the matter. It is also clear that, in Scots law, statute "trumps" customary norms (*Moretensen v Peters* (1906) 5 Adam 121).

³¹ AC Evans, "Treaties and United Kingdom Legislation: The Scottish Dimension" 1984 JR 41.

³² Murray Hunt, *Using Human Rights Law in English Courts*, Hart Publishing, 1998, 11.

not itself have the power to alter the law (that being a matter for the legislature)³⁴. As the ILA Committee on International Law in Municipal Courts put it, "to admit that a treaty could have force to create rights and duties in municipal law unaided by its incorporation in that law by statute would be to admit that the executive could make law, thus infringing the doctrine of the separation of powers"³⁵.

It is, then, clear that treaties are not self-executing in UK law³⁶. Rather, they require to be implemented by primary legislation³⁷. If such primary legislation has not been enacted, and still more if it has been enacted in terms which run contrary to the treaty, the treaty cannot be invoked in the domestic courts to override domestic law. Mann asserts that treaties, being non-justiciable, cannot provide a defence³⁸. Higgins attributes the non-justiciability of treaties to the fact that the performance of a treaty obligation is a matter of prerogative and that treaties, other than human rights treaties, do not bestow benefits on individuals³⁹.

There is a presumption that municipal law will conform to international

³³ R Higgins, "United Kingdom" in FG Jacobs and S Roberts (eds), *The Effect of Treaties in Domestic Law*, Sweet & Maxwell, 1987, 123, 137.

³⁴ See FA Mann, *Foreign Affairs in English Courts*, Clarendon Press, 1986, 84; and S de Smith and R Brazier, *Constitutional and Administrative Law*, 7th edition, Penguin Books, 1994, 151-153. We may compare the position in the USA, where, by Article VI of the Constitution, treaties are to form part of domestic law and judges are bound by them. US treaty practice therefore finds it necessary to involve the legislature in the accession process. Similarly, the French Constitution of 1958 provides by Article 55 that treaties, once ratified and published, have an authority superior to that of legislation. This is not to say that all treaties to which the USA is Party are self executing, but elaboration of the issues in US law is outwith the scope of this thesis. For a detailed consideration, see Y Iwasawa, "The Doctrine of Self-Executing Treaties in the United States: A Critical Analysis" 26 *Virginia Journal of International Law* 627 (1986).

³⁵ International Law Association, Committee on International Law in Municipal Courts, "First Report: Summary of Questionnaire Responses", in *Report of the Sixty-Sixth Conference*, 1994, 326, 327.

³⁶ Mann has suggested (*op cit*, 84) that a treaty relating to a matter exclusively within the scope of the prerogative may have the force of law directly but it is thought that no matter within the criminal law field would come into that category. Even diplomatic immunity is regulated by statute (Diplomatic Privileges Act 1964 Schedule 1).

³⁷ See the UK's response to a Council of Europe questionnaire on the issue, reproduced at 58 B Yb Int'l L (1987) 506.

³⁸ FA Mann, *op cit*, 82. His examples relate to civil proceeding but there seems to be no reason in principle why criminal proceedings should be subject to any different rule and there is certainly no authority that they are.

³⁹ *Loc cit*.

law but it is only a presumption. Diplock LJ summarised the position in *Salomon v Commissioners of Customs and Excise*⁴⁰: "[w]here, by a treaty, Her Majesty's Government undertakes either to introduce domestic legislation to achieve a specified result in the United Kingdom or to secure a specified result which can only be achieved by legislation, the treaty, since in English law it is not self operating, remains irrelevant to any issue in the English courts until Her Majesty's Government has taken steps by way of legislation to fulfil its treaty obligations. Once the Government has legislated...the court must in the first instance construe the legislation, for that is what the court has to apply. If the terms of the legislation are clear and unambiguous, they must be given effect to, whether or not they carry out her Majesty's treaty obligations, for the sovereign power of the Queen in Parliament extends to breaking treaties⁴¹." Lord Diplock had said something very similar in *British Airways v Laker Airways*⁴². In *Kaur v Lord Advocate*⁴³ Lord Ross adopted the same reasoning⁴⁴ and, although *Kaur* has since been overturned in *T, Petitioner*⁴⁵, it is clear that the Inner House in that case nevertheless accepted the accuracy of what Lord Diplock had said in *Salomon*. It was what Lord Ross built on that foundation that they proceeded to demolish⁴⁶. *Salomon* may therefore be regarded as expressing Scots law as well as English. It may be added that treaties which have been incorporated are in no special position

⁴⁰ [1967] AC 116 at 143. Lord Diplock referred, as authority for this passage, to *Ellerman Lines Ltd v Murray*; *White Star Line of Royal and United States Mail Steamers Oceanic Steam Navigation Company Ltd v Comerford* [1931] AC 126 in which the failure of the Merchant Shipping (International Labour Conventions) Act 1925 to give proper effect to a draft convention of the International Labour Organization of the League of Nations was fatal to the appellants' case.

⁴¹ The European Court of Human Rights has been careful, in *Swedish Engine Drivers' Union v Sweden* (1976) 1 EHRR 617, to avoid holding that the Article 13 ECHR obligation to provide an effective remedy before a national authority in respect of the violation of ECHR rights amounted to a requirement to incorporate ECHR into national law.

⁴² [1985] AC 58, 85-86.

⁴³ 1981 SLT 322.

⁴⁴ At 330.

⁴⁵ 1997 SLT 724.

⁴⁶ See especially the opinion of Lord President Hope at 733 J-K.

and in particular do not represent "higher" law than statute⁴⁷.

The legislative transformation of treaties

The process of legislative transformation of a treaty can be difficult, not least because of inherent differences between a treaty and legislation. To make the point by over-simplifying it, treaties are negotiated by diplomats whose primary objective is likely to be agreement and who will be prepared to achieve it through "accommodation and compromise through vague and ambiguous language"⁴⁸; whereas the primary task of the Parliamentary draftsman is to achieve certainty.

The means of effecting legislative transformation of treaties have been analysed in various ways⁴⁹ but we take as our framework Bennion's tripartite division⁵⁰. First, he suggests, an Act may embody provisions which have the same effect as the treaty, but which do not necessarily use the same words. Secondly, the Act may provide that the treaty itself is to have effect as law. Finally, the treaty may "be left simply as an international obligation, being referred to in the construction of a relevant enactment only so far as called for by the presumption that Parliament intends to comply with public international law"⁵¹.

Bennion's first option

Bennion regards the first option as the most satisfactory because it allows for the tailoring of the language to the municipal legal system of the country concerned. Lord Diplock explained the need for this in *Fothergill v Monarch Airlines*⁵²: "[t]he language of that Convention which has been adopted at the international conference to express the common intention of the majority of states represented there is meant to be understood in the same sense by the courts of all those states which ratify or accede to the Convention. Their national styles of legislative draftsmanship will vary considerably as between one another...The language of an

⁴⁷ Higgins, *op cit*, 129. How far this proposition will require to be modified by the somewhat special case of the Human Rights Act 1998 remains to be seen; though even in that example, the status which the treaty has as regards legislation is itself derived from legislation.

⁴⁸ See DL Mendis, "The Legislative Transformation of Treaties" 1992 *Statute Law Review* 216.

⁴⁹ For a survey, see Mendis, *op cit*.

⁵⁰ FAR Bennion, *Statutory Interpretation: A Code* (3rd Edition), Butterworths, 1997, 523.

⁵¹ Bennion, *loc cit*.

international convention...is neither couched in the conventional English legislative idiom nor designed to be construed exclusively by English judges". The same could be said, *mutatis mutandis*, about the construction of treaties by Scottish judges.

Reasonable as this undoubtedly is, it nevertheless has the effect that what the courts come to interpret and apply will not be the treaty but will be the statute. On the basis of *Salomon*, a discrepancy between the meaning of the treaty and the meaning of the statute will be resolved in favour of the statute. Indeed, if the statute is clear and unambiguous, *Salomon* decides that the treaty will not even be looked at, notwithstanding Mann's assertion that the "convention belongs to the *travaux préparatoires* [of the statute] which an English judge is allowed to look at"⁵³.

Bennion's second option

Bennion's second option is one which has been much used in relation to extradition treaties, typically by a combination of primary legislation and Order in Council. In the case of the European Convention on Extradition 1957 ("ECE"), the primary legislation is the Extradition Act 1989 ("the 1989 Act"), which provides all of the domestic legal framework within which the treaty arrangements are to operate. Subordinate to that is the European Convention on Extradition Order 1990⁵⁴ which gives effect to the Convention and reproduces it in a Schedule. That reproduction opens the Convention to the scrutiny of the UK courts as part of UK law rather than merely as an aid to interpretation; though there is some lack of clarity about what it is that the courts think they are interpreting where this method is used. In *The Hollandia*⁵⁵, Sir Sebag Shaw said that a UK legislative provision which incorporates international rules in a schedule operates so as to "imbue them with the character of a statutory enactment". In the same case, Ackner LJ considered that he was dealing with a

⁵² [1981] AC 251.

⁵³ *Op cit*, 98.

⁵⁴ SI 1990 No.1507.

⁵⁵ [1982] 1QB 872 at 885.

question of statutory interpretation. In *Fothergill v Monarch Airlines*⁵⁶, however, Lord Wilberforce considered that he was to interpret the text of a treaty incorporated by this method "according to the principles upon which international conventions are to be interpreted".

Both of these approaches have something to be said for them. Where the words of a treaty are enacted in a statute, one can see why they should be imbued with statutory quality. Alternatively, since the principles of treaty interpretation are matters of customary international law and hence directly part of UK law⁵⁷, one can see why they should be applied to treaty wording reproduced in statute. The Wilberforce approach has not, however, been reflected in the actual approach of the courts.

Gardiner has pointed out that English courts have tended to assume that "the process of bringing a treaty into English law by legislation excuses them from considering fully the international law origins of treaties"⁵⁸. His analysis proceeds under reference to cases in the civil courts and his conclusion is that the courts have tended to "cherry pick" from the principles set out in Article 31 of the Vienna Convention on the Law of Treaties 1969 ("the 1969 Vienna Convention"), making occasional reference to isolated aspects of them in order to support particular interpretations rather than treating them as the framework for interpretation. Writing in relation to the *Fothergill* case itself, Bates has been critical of the Court's understanding of the Vienna rules and of its understanding of their relevance⁵⁹. In a criminal law context, examination of the extradition cases demonstrates that, although the courts purport to interpret treaties incorporated by the enactment of their words according to their character as treaties, in fact the Vienna rules are effectively ignored in favour of a flawed approach based on the analogy between treaties and contracts and justifiable neither on the Wilberforce

⁵⁶ At 281.

⁵⁷ See n 30 above.

⁵⁸ Richard Gardiner, "Treaty Interpretation in the English Courts since *Fothergill v Monarch Airlines*" (1995) 44 ICLQ 620, 626.

⁵⁹ T StJ Bates, "A Treaty and its Texts in the Courts" 1981 *Statute Law Review* 99.

approach nor on the Shaw/Ackner approach.

*R v Governor of Ashford Prison, ex p Postlethwaite*⁶⁰ is the leading case on the interpretation of extradition treaties. The House of Lords' approach in that case was based on what was said in two earlier cases, namely *re Arton (No 2)*⁶¹ and *R v Governor of Ashford Remand Centre ex p Beese*⁶². In *Arton*, Lord Russell CJ said that extradition treaties "should receive a liberal interpretation, which means no more than that they should receive their true construction according to their language, object and intent". This was consistent with what came to be Article 31(1) of the 1969 Vienna Convention. In *Beese*, however, Lord Widgery CJ said that the treaty "is a contract between two sovereign states and has to be construed as such a contract. It would be a mistake to think that it had to be construed as though it were a domestic statute. It must be construed as a contract, and when its true meaning has been ascertained in that way, then that meaning must be applied to the Act of 1870 with such consequences as follow". A little later, he said "we have two contracting parties making a bargain. The bargain involves an obligation on each to surrender the citizens of the other under extradition procedures". Lord Parker CJ had used similar language in *Kotronis*⁶³. But although there is an obvious analogy between treaties and contracts⁶⁴, Szasz points out that "while maintaining their contractual trappings, the instruments that nowadays form the backbone of the law of nations...are not contractual in the normal sense"⁶⁵. Lord Widgery's approach elevates an analogy into a canon of interpretation.

Postlethwaite turned on the question whether the evidence adduced in support of an extradition request from Belgium had to be in a form in which it was admissible in an English court. The bilateral extradition treaty with Belgium

⁶⁰ [1988] 1 AC 924; see especially Lord Bridge of Harwich at 945.

⁶¹ [1896] 1 QB 509.

⁶² [1973] 1 WLR 969.

⁶³ *R v Governor of Brixton Prison, ex p Kotronis* [1971] AC 260 at 260.

⁶⁴ Paul Szasz, "General Law Making Processes", in Oscar Schachter and Christopher C Joyner (eds), *United Nations Legal Order*, Vol 1, ASIL/Grotius, 39.

⁶⁵ *Loc cit.*

in fact set out procedure in the English court of committal in some detail and in particular it included the requirement that the fugitive, having been the subject of provisional arrest, should be set free if the "evidence" in support of the request was not presented within two months. The court had to decide what was meant by "evidence".

In the House of Lords, Lord Bridge of Harwich said that two important principles had to be borne in mind. The first of these he derived from *Arton* : "the court should not, unless constrained by the language used, interpret any extradition treaty in a way which would 'hinder and narrow the operation of most salutary international arrangements'". The second he derived from *Beese*: extradition treaties are contracts⁶⁶.

Bennion's third option

Bennion's third option as regards the effect of treaties in domestic law is the leaving of the treaty as an interpretative tool. So far as Scots law is concerned, this third option has only relatively recently become available, as a result of *T, Petitioner*⁶⁷. Hitherto, Scots law was expressed in *Kaur v Lord Advocate* and in *Moore v Secretary of State for Scotland*⁶⁸, both of which concerned the use to be made of the Convention for the Protection of Human Rights and Fundamental Freedoms 1950 ("ECHR") and which in Murdoch's estimation, stood "as twin watchdogs at the doors of the [Scottish] legal system prohibiting entry of [ECHR] without legislative authority". Murdoch went on to point out that those decisions not only denied to ECHR the status of a hierarchically superior norm but also prevented use of the Convention as an aid to the construction of statutes and as a

⁶⁶ In *Re McAliskey* unreported, Queens Bench Divisional Court, 22 January 1997, CO 156/97, the Divisional Court followed *Postlethwaite* and *Arton* in holding that a treaty should receive a liberal interpretation. The issue was the effect on UK obligations of the German reservation to ECE by which that State declines to extradite its nationals. The Court referred to the 1969 Vienna Convention for the meaning and purpose of reservations. But even though the Court referred to that Convention for one purpose and even though the correct approach to the interpretation of treaties was an issue no reference was made to the treaty interpretation provisions of the Convention.

⁶⁷ *Supra*.

⁶⁸ 1985 SLT 38.

source of principle for development of the common law⁶⁹. He maintained (probably correctly) that of all the then member states of the Council of Europe it was the legal system of Scotland which accorded ECHR the least recognition⁷⁰.

In *Kaur* Lord Ross, sitting in the Outer House, refused to treat ECHR as an aid to interpretation of statute, saying "[i]f a Convention does not form part of the municipal law, I do not see why the court should have regard to it at all". In *Moore* the Inner House said that Lord Ross in *Kaur* had been correct to hold that ECHR plays no part in UK law unless incorporated by legislation. Bates, however, has criticised Lord Ross's reasoning on a number of grounds, the first of which is that Lord Ross had based his opinion on "a limited analysis of the issues and of the English case law" and "the view of a rather limited range of English textbook writers". He has pointed out that unincorporated treaties which evidence rules of customary international law will certainly be required to be considered by the court and concluded that "giving a limited interpretative effect to unincorporated treaty provisions is not the dramatic departure from principle it is sometimes presented"⁷¹.

Since Bates wrote, the rule that ambiguous statutory provisions fall to be interpreted so as to conform to the UK's international treaty obligations has been consolidated in English law and that development has been applied to Scots law in *T, Petitioner*. This case represented an opportunity which Lord President Hope had been seeking for some time⁷². In it, he said that the view which Lord Ross had expressed in *Kaur* was looking increasingly outdated and that it was time that it was expressly departed from⁷³. He went on to point out that "it is now clearly established as part of the law of England and Wales...that in construing any provision in domestic legislation which is ambiguous in the sense that it is

⁶⁹ JL Murdoch, "The European Convention on Human Rights in Scots Law", [1991] PL 40.

⁷⁰ *Loc cit.*

⁷¹ T StJ Bates, "Treaties in the Courts" 1981 *Statute Law Review* 40.

⁷² Lord Hope of Craighead, "Devolution and Human Rights" [1998] EHRLR 367, 370.

⁷³ The opportunity had in fact been missed in *Lord Advocate v Scotsman Publications Ltd* 1989 SLT 705 when the House of Lords, in a Scottish appeal, followed the English authorities and used

capable of bearing a meaning which either conforms or conflicts with the [Human Rights] Convention, the Courts will presume that Parliament intended to legislate in conformity with the Convention, not in conflict with it".

This is, of course, entirely consistent with the residual effect of treaties contemplated in *Salomon*. In that case, almost immediately after the passage quoted above about the sovereign power to break treaties, Lord Diplock went on to say: "...if the terms of the legislation are not clear but are reasonably capable of more than one meaning, the treaty itself becomes relevant, for there is a *prima facie* presumption that Parliament does not intend to act in breach of international law...if one of the meanings which can reasonably be ascribed to the legislation is consonant with the treaty obligations and another or others are not, the meaning which is consonant is to be preferred". Lord Diplock was to repeat this view within a few months in *Post Office v Estuary Radio*⁷⁴ and the position was to be reinforced in *Fothergill v Monarch Airlines*⁷⁵, when the House of Lords reviewed the development of the law and Lord Roskill said⁷⁶: "In my judgement it is now clear law that where the source of the legislation in question is not the ordinary Parliamentary process but is an international treaty or convention and the statute is designed to give effect to that treaty or convention, it is legitimate to look at that source in order to resolve ambiguities in the legislation which has made those treaty or convention provisions part of the municipal law of this country"⁷⁷. An example of this being done is to be found in *R v Bow Street Metropolitan Stipendiary Magistrate and others ex p Pinochet Ugarte (No 3)*⁷⁸ in which the House of Lords, in seeking to determine whether the double criminality principle in the 1989 Act applied at the date of the offence or at the date of the extradition request, considered the *travaux préparatoires* of ECE for what assistance could

ECHR as an aid to interpretation but without explicitly considering whether that could be done and without reference, disapproving or otherwise, to *Kaur*.

⁷⁴ [1968] 2QB 740 at 757.

⁷⁵ *supra*.

⁷⁶ At 299.

⁷⁷ This passage was strictly *obiter* because the treaty in question had in fact been incorporated in a Schedule to the Carriage by Air Act 1961.

be derived⁷⁹.

In *T, Petitioner*, the Lord President adopted language similar to that used by Lord Roskill in *Fothergill*, saying that the Scottish courts should now apply the same approach as the English, so that "when legislation is found to be ambiguous in the sense that it is capable of a meaning which either conforms to or conflicts with the Convention, Parliament is to be presumed to have legislated in conformity with the Convention, not in conflict with it". This must be regarded as the definitive articulation of Scots law on the subject⁸⁰; though one qualification must be made. Even before *T, Petitioner*, Lord Justice-General Hope was prepared, in *Anderson v HM Advocate*⁸¹, to consider the case law of ECtHR, distinguishing those cases which limit reference to unincorporated treaties on the basis that the High Court was not in *Anderson* concerned with statutory interpretation, so that the need to recognise the supremacy of Parliament, which has always been a matter of concern to the courts, did not arise.

The availability of an unincorporated treaty as a aid to statutory interpretation is confined to those circumstances in which the legislation is ambiguous, in which case if it can be construed so as to be consistent with the Convention it should be so construed. Gilmore and Neff have pointed out that the use of ECHR as an aid to interpretation is subject to the inherent limitation that it can only arise where domestic law is "in a state of uncertainty"⁸². It remains the position that, as Davitt, P. put it for Irish law in *Gearóid Ó Laighlis*⁸³, "where there is an irreconcilable conflict between a domestic statute and the principles of international law or the provisions of an international convention, the Courts administering the domestic law must give effect to the statute". It is true that

⁷⁸ [1999] TLR 222 (March 25, 1999).

⁷⁹ See especially the speech of Lord Browne-Wilkinson. The case is considered in more detail below, 114.

⁸⁰ It may also be noted that it is the approach criticised by Evans, in commenting on *Kaur*, as lacking rigour: see AC Evans, *op cit*, 62.

⁸¹ 1996 SLT 155.

⁸² WC Gilmore and SC Neff, "On Scotland, Europe and Human Rights" in HL MacQueen, ed, *Scots Law into the 21st century; Essays in Honour of WA Wilson* W Green/Sweet & Maxwell, 1996, 265, 267.

Brownlie has asserted that treaties may be used to identify latent ambiguities in their implementing statutes⁸⁴ but (subject to the effect of the Human Rights Act 1998⁸⁵ ("HRA")) that proposition cannot at present be supported by UK authority, runs contrary to the insistence in *Salomon* that "if the terms of the legislation are clear and unambiguous, they must be given effect to, whether or not they carry out Her Majesty's treaty obligations, for the sovereign power of the Queen in Parliament extends to breaking treaties" and seems to be excluded by the approach taken by the House of Lords in *Brind v Secretary of State for the Home Department*⁸⁶, which has been summarised as being that "the presumption that legislation complies with treaty obligations does not apply so as to limit the meaning of clear general words, but can be applied only where there is a real ambiguity, ie where the words are capable of bearing more than one meaning"⁸⁷.

That the theory is as described is a proposition which is well supported by the cases cited. In at least one asylum and one mutual legal assistance case recently, however, the House of Lords and the Divisional Court have used international law material more freely than *Brind* might have led one to expect. The asylum case is *T v Home Secretary*⁸⁸ and the mutual assistance case is *R v Secretary of State for the Home Department, ex p Fininvest SpA and Others*⁸⁹.

In *T v Home Secretary* the appellant sought to overturn the Home Secretary's refusal of his asylum application and the case depended on whether or not the act of causing an explosion which killed 10 people was a political crime. The House of Lords proceeded on the basis that the concept of the political offence is identical as between asylum law and extradition law.

In concluding that the appellant's crime was not within the scope of the

⁸³ [1960] IR 93.

⁸⁴ I Brownlie, *Principles of Public International Law*, 5th edition, Clarendon Press, Oxford, 1998, 48; a passage quoted (from the 3rd edition) with approval by the Canadian courts in *National Corn Growers Association v Canadian Import Tribunal* (1990) 74 DLR (4th) 449, 483.

⁸⁵ See 52 below.

⁸⁶ [1991] AC 696.

⁸⁷ Lord Browne-Wilkinson, "The Infiltration of a Bill of Rights" [1992] PL 397, 404.

⁸⁸ [1996] 2 WLR 766.

⁸⁹ [1997] 1 All ER 942.

concept, Lord Mustill considered international material for the light which it shed on the perceptions of the international community about the degree of protection which should be given to refugees who have committed violent crime which has harmed the public at large. He examined, *inter alia*, the European Convention on the Suppression of Terrorism 1977 (to which effect has been given in UK law⁹⁰) and the League of Nations Convention for the Prevention and Punishment of Terrorism 1937 (which never entered into force). Lord Mustill's exposition of the concept of the political offence was masterly; but at no stage did he explain the theoretical basis on which reference to such material could be justified.

In *T v Home Secretary*, Lord Mustill was concerned with an international law concept and was not concerned with an unadorned question of the application of a statute. One can understand why he thought the international material relevant and also why he might not have regarded the limitations on the use of international material as requiring his attention. The emphasis in cases such as *Salomon* and (as regards customary international law) *Mortensen v Peters*⁹¹ is on the sovereignty of Parliament. Where that concept was not really in issue, the need to take care to keep international law in a subordinate position within the domestic legal system did not arise. In *Fininvest*, however, a statutory provision was in issue and it rather appears that the theory was overlooked.

The point at issue was whether the Secretary of State ought, in exercising his discretion to refer to the Serious Fraud Office a request for mutual assistance received by him⁹², to consider whether or not the request concerns a political offence. In dealing with that, Simon Brown LJ devoted substantial consideration to the question whether the Home Secretary should have had regard to Article 2(a) ECMA⁹³. He referred to ECMA for two propositions. The first related to an

⁹⁰ Suppression of Terrorism Act 1978, now re-enacted, with enlargements, by the Extradition Act 1989.

⁹¹ See n 30 above.

⁹² See 191 below.

⁹³ Gage J, who sat with him, simply agreed with Simon Brown LJ's judgement and Lords Lloyd of Berwick, Steyn and Hope of Craighead in due course refused leave to appeal to the House of Lords, so that Simon Brown LJ's judgement is the only reasoned opinion we have in the case.

attempt by the applicants for judicial review to persuade the court to understand the reference to “evidence” in section 4 of the 1990 Act in the restricted way the word had been understood before the passing of that Act. He replied to this that “the 1990 Act ... created a wholly new scheme for mutual assistance with regard to criminal investigations, a scheme under which it would plainly be necessary to examine altogether more material than would ultimately constitute evidence at any trial. True, the word 'evidence' continues to be used, but Parliament cannot thereby have intended to confine assistance within the relatively narrow limits prescribed by the *Westinghouse* case and *Re State of Norway's Application (No 1)*. That in effect would be to defeat the very change being brought about by the 1990 Act. The terms of art 1 of the 1959 Convention should in this regard be noted”⁹⁴. He then quoted Article 1 ECMA and went on to say that “that consideration of itself is sufficient to defeat the applicants' central contentions here with regard to the width of disclosure sought in this case”. One cannot quarrel with the conclusion that the intention of the 1990 Act was to make assistance more widely available than had previously been the case; but it is doubtful whether the word “evidence” in the context of the 1990 Act is really ambiguous so as to make it legitimate for the Court to refer to the unincorporated Convention.

When Simon Brown LJ referred again to ECMA he recorded that the Home Secretary had founded on the silence of the 1990 Act as regards political offences and that this silence was contrasted with the making of explicit provision as regards fiscal offences. He said, however, that the Home Secretary's position was “plainly unsound” because section 4(3) deals only with some fiscal offences and not all of them and does so merely by removing the discretion which would otherwise exist with regard to them. He went on to say “This leaves other fiscal offence requests to be considered, just like any political offence requests, under the remaining provisions of s4, which expressly confer upon the Home Secretary a general discretion in the matter. It seems to me quite impossible to contend that in exercising this general discretionary power the Home Secretary is entitled to

⁹⁴ Emphasis added.

ignore the express discretion arising under art 2. The Secretary of State would in my judgement *plainly be overlooking a material consideration if, for example, he simply forgot the existence of art 2(a)*⁹⁵.

An assumption underlies Simon Brown LJ's remark that the Secretary of State is not entitled to ignore the treaty provision. That assumption is that the question whether or not the Secretary of State complies with the treaty is justiciable at the instance of an individual as an exception to the general rule that reference may only be made to treaties where an ambiguous statutory provision requires to be interpreted. There is no authority for the proposition that there is any such exception and Simon Brown LJ did not support his reference to the treaty by reasoning. At best, it is suggested, the basis on which reference was made to the treaty in *Fininvest* is very doubtful.

Conclusion

In theory, treaties require legislative transformation before they can properly be invoked in municipal law, except where implementing legislation is ambiguous. In that case, the effect of the presumption that the UK intends to legislate in conformity with its treaty obligations is to make treaties available as interpretative tools. Especially as regards Scots law, that presumption has been developed under reference to ECHR. Most of the rights guaranteed by Part 1 of ECHR are now being incorporated into UK law by HRA. Whether the presumption will be further developed in relation to other treaties remains to be seen.

There has in some cases been a lack of clarity about the principles to be applied to the interpretation of incorporated treaties and, although the use of the contractual analogy will often achieve the same result as a theoretically more sound approach, that cannot be guaranteed. The principles of the interpretation of contracts are sophisticated and some of them (such as those relating to implied terms) could produce highly unsatisfactory results if applied to treaties.

The use of the contractual analogy suggests that some judges have an

⁹⁵ Emphasis added.

uncertain grasp of the law as to the effect of treaties in domestic law. The same conclusion is suggested by the reference made to ECMA in *Fininvest* even though the legislation is not obviously ambiguous. Other cases, however, suggest that certain judges have sought, in a rather deliberate way, to limit the effect of the restrictions on the use of unincorporated treaty material. Lord Mustill made wide ranging reference to international material in *T v Home Secretary*. In *Anderson*, Lord Hope distinguished the situation in which the question before the court related to common law rather than statute, so as to permit reference to the ECHR case law. In *McLeod, Petitioner*⁹⁶, Lord Rodger said that the Convention case law could be used for its persuasive effect. Since the case law interprets the Convention, one may wonder how meaningful the distinction actually is.

Accordingly, although in theory the law makes a clear distinction between incorporated and unincorporated treaties, in practice the distinction may be somewhat blurred. Generally, however, it seems clear that, in the theoretical relationship between international law and municipal criminal law, it is municipal law which takes priority. Cases such as *T v Home Secretary*, *Anderson* and *McLeod* do not address the main issue of the relationship between treaties and statutes. In *Fininvest*, where that issue did arise, it was not addressed.

⁹⁶ 1998 SLT 233.

3. EXTRADITION

The structure of this chapter

Extradition is a subject with a long history and a correspondingly large literature. It would therefore have been possible to write this thesis under exclusive reference to extradition. To have done so, however, would have limited the conclusions which could be drawn. Themes which recur in several areas of the law can be regarded as a more reliable guide to the relationship between international law and criminal law in general than those which are identified in relation to only one subject area. The desirability of treating of other subject areas imposes a useful discipline on this chapter, which is necessarily selective in its treatment of extradition. It begins with some general introductory material and then proceeds to aspects of the UK's international extradition arrangements. Thereafter, it examines aspects of municipal extradition law. Finally, some conclusions are drawn as to the relationship between international law and criminal law as it appears from extradition in particular.

Introduction

The nature of extradition

Extradition is the return in accordance with law of a person ("the fugitive"⁹⁷) from the country where he is found ("the requested state") to the country where he is accused of, or has been convicted of, an offence ("the requesting state"). The return of such fugitives is a transaction between governments⁹⁸ and a state which enters into extradition arrangements is likely to have a complex mixture of motives for so doing. As a requesting state, it will wish to strengthen its law enforcement activities by denying fugitives from its justice a safe haven anywhere. As a requested state, it will wish to prevent itself from becoming a haven for foreign criminals, who might represent a threat to its own law and order

⁹⁷The word does not necessarily imply actual flight. The person may simply have returned to his home country in the normal course of affairs before the crime came to light or he came to be suspected.

but whom it might, for a variety of reasons (including obligations under human rights treaties and the right to freedom of movement conferred by Article 48 EC) be unable to deport⁹⁹. It will also wish to benefit from reciprocity in other cases when it is in turn the requesting state¹⁰⁰.

Extradition also has a protective aspect, though there is a case for saying that the safeguards in extradition law are designed to serve the interests of the requested state more than those of the fugitive¹⁰¹. Relatively recent developments in the European Court of Human Rights ("ECtHR") have, however, made it clear that human rights obligations can in some circumstances affect the way in which a requested state deals with extradition¹⁰².

The division of responsibility

The availability of extradition from the UK depends on the existence of an international extradition arrangement¹⁰³. That arrangement may be bilateral, multilateral or *ad hoc*. The municipal legal framework is contained in the 1989 Act, under which responsibility for extradition is shared between the judiciary (which determines whether the criteria for return set out in the law are satisfied) and the executive (which determines whether or not to surrender in fact a person whom the courts have determined to be liable to return as a matter of law). The limits on the functions of the courts and the nature of the functions of the executive in such a system were perhaps most clearly articulated in *United States*

⁹⁸ See *Report of the Working Party on The Extradition Act 1870*, 1974, 8 ("the 1974 Working Party Report").

⁹⁹ For an example of the relevance of ECHR to the deportation of a recidivist, see *Moustaquim v Belgium* (1991) 13 EHRR 802. As to the restrictions which the right to freedom of movement imposes on deportation, see *R v Bouchereau* [1978] QB 732.

¹⁰⁰ JD McCann, "United States v Jamieson: the Role of the Canadian Charter in Canadian Extradition Law" 30 *Cornell International Law Journal* 139, 141-2 (1997). Gilbert has suggested (Geoff Gilbert, *Transnational Fugitive Offenders in International Law*, Martinus Nijhoff Publishers, 1998, 30) that common law states place a higher priority on being able to rid themselves of undesirables than on securing reciprocity.

¹⁰¹ See International Law Association, Committee on Extradition and Human Rights, First Report, *Report of the Sixty-Sixth Conference*, (Buenos Aires Conference, 1994), 146; John Dugard and Christine Van den Wyngaert, "Reconciling Extradition with Human Rights" 92 AJIL 187, 188 (1998).

¹⁰² See 59.

¹⁰³ Extradition Act 1989 s1.

*v Jamieson*¹⁰⁴, where a Canadian court noted that the court should not usurp the discretionary authority of the minister, who must consider comity, reciprocity, treaty obligations and national security interests¹⁰⁵. It has been said that the foreign policy considerations relevant to a decision to surrender are often known only to those in the highest positions in the executive and that only they are in a position to "engage in the discreet diplomatic manoeuvring the process may require"¹⁰⁶. An example of this in practice is to be found in *Re Schmidt*¹⁰⁷ in which the House of Lords, distinguishing *R v Horseferry Road Magistrates' Court ex p Bennett*¹⁰⁸, held that the remedy for a fugitive lured by deception to the UK in order that he might thereupon be extradited to Germany lay in the discretion of the Secretary of State¹⁰⁹. To this it may be added that the decision to enter into an extradition arrangement in the first place, which entails in UK practice a judgement about whether the standards of justice and penal administration in the proposed treaty partner are acceptable¹¹⁰, is a prerogative matter and hence one for the executive. It is traditionally within the province of the Home Office¹¹¹.

In summary, then, "extradition law is a blend of international and national law. Treaties may provide for the rendition of criminal fugitives between states, but it is for municipal law to determine whether the fugitive is to be surrendered in accordance with the extradition treaty"¹¹². It follows from the nature of extradition law and practice that the existence of a relationship between international law and municipal law may, in the context of extradition, be treated as given. The task in this thesis is to examine the nature of that relationship.

¹⁰⁴ 93 CCC3d 265.

¹⁰⁵ See JD McCann, "*United States v Jamieson*....." 162.

¹⁰⁶ J Semmelman, "Federal Courts, The Constitution, and the Rule of Non-Inquiry in International Extradition Proceedings", 76 *Cornell Law Review* 1198, 1229-30 (1991).

¹⁰⁷ [1994] 3 WLR 228.

¹⁰⁸ [1994] 1 AC 42.

¹⁰⁹ *Schmidt* is further considered at 140 below.

¹¹⁰ 1974 *Working Party Report*, 15. The report went on to concede that a difficulty arises where conditions change in a state with which the UK has a treaty arrangement.

¹¹¹ *Ibid*.

¹¹² Dugard and Van den Wyngaert, "Reconciling Extradition with Human Rights", 188.

The Anglocentricity of UK extradition law

During the formative and primary developmental periods of extradition law (at least as regards the UK's involvement), UK domestic law was governed principally by the 1870 Act as amended¹¹³. The procedure which the Act prescribed was based very closely on English committal procedure. It epitomised the "essentially 19th century view" that "as a common law jurisdiction, with well established mechanisms for ensuring the fairness and effectiveness of criminal proceedings, it was neither right nor possible to take much cognisance of other countries' judicial processes"¹¹⁴; and it reflected the fact that the UK was "protected by the sea from extensive traffic in fugitive criminals, its Parliament infected with a Dicyean suspicion of things continental and legal and its public opinion firmly resolved to protect fugitives waging revolution against continental despotisms"¹¹⁵. Moreover, although the 1870 Act was a UK statute, it was quintessentially English in its philosophy and content¹¹⁶. With one exception, fugitives found in Scotland were removed to London, there to be dealt with at Bow Street Magistrates' Court, under procedure which did not to any extent reflect Scots law and practice. As the 1985 Green Paper, *Extradition*, pointed out: "few legal systems would deny recourse to a person arrested within their jurisdiction to a court of that jurisdiction, and this is what happens at present in Scotland in extradition cases, where the fugitive's only recourse is to the English courts"¹¹⁷. As a consequence, Scotland developed almost no extradition jurisprudence of its own.

The exception arose as a result of sections 10, 11 and 16 of the 1870 Act, which, taken together, gave the sheriff an extradition jurisdiction in relation to crime committed on board a vessel on the high seas. In *Wan Ping Nam v Federal*

¹¹³ Especially by the Extradition Acts 1873 and 1932.

¹¹⁴ A Harding, "Treaty Making in the Field of International Co-operation: The United Kingdom Experience", in A Eser and O Lagodny, (eds) *Principles and Procedures for a New Transnational Criminal Law*, Society for the Reform of Criminal Law and Max Planck Institute for Foreign and International Criminal Law, 1992, 235-6.

¹¹⁵ Colin Warbrick, "The Criminal Justice Act 1988 (1) The New Law on Extradition" [1989] Crim LR 4.

¹¹⁶ See W Finnie, "The Procedure of Extradition from Scotland" 1983 SLT (News) 25, 41.

*German Republic Minister of Justice and Others*¹¹⁸, the fugitive was alleged to have committed homicide on a German registered vessel and, the ship having called at Greenock, was arrested and placed before the sheriff pursuant to an extradition request from Germany. The sheriff committed him for return and he petitioned the *nobile officium*. In delivering the Opinion of the Court, Lord Justice-General Emslie noted that the Act was “couched in language which plainly has the jurisdiction and the procedure of the English courts primarily in mind”. In particular, it provided that a fugitive committed for return had the right to apply for a writ of *habeas corpus*. That, of course, is an English law remedy, wholly unknown in Scots law. The Court held that, since the clear intention of the Act was that relief should be available to persons committed for return and since the Act plainly did not intend that persons committed in Scotland should be in any less advantageous position than those committed in England, the petition to the *nobile officium* was competent¹¹⁹.

The 1870 Act, then, almost always required that a fugitive found in Scotland should be taken to London and dealt with under English law. In the exceptional cases in which there was a Scottish jurisdiction, the Scottish courts were required to apply a procedure which had been modelled on an aspect of English criminal procedure (committal) and which was so ill-suited to the Scottish legal context that it had to be supplemented by the *nobile officium* of the court, a remedy which was to be characterised by the Court in *Wan Ping Nam* as “the power of interfering in *extraordinary* circumstances for the purpose of preventing injustice or oppression”¹²⁰. Criticising the practice of drafting “Anglo-Scottish legislation” in English terms and then adapting it for Scotland¹²¹, the Renton Committee remarked that “a bicycle intended to be ridden by two people ought to be designed as a tandem from the outset, and not as a solo to which a second seat

¹¹⁷ *Extradition*, Cmnd 9421, 1985, 16.

¹¹⁸ 1972 SLT 220.

¹¹⁹ Ultimately, however, it failed.

¹²⁰ Emphasis added.

¹²¹ Committee on the Preparation of Legislation, *The Preparation of Legislation* (Cmnd 6053), 1975, chapter XII.

will later be attached"¹²². The 1870 Act illustrated their point rather well.

As we proceed, we shall see many examples of rules of municipal law or treaty provisions which have been enacted or agreed in terms which sit uneasily with Scots law. It would go too far to say that such rules and provisions are impossible to implement in Scots law; but it is true to say that they give or have the potential to give difficulty of varying degrees. The flexibility of Scots law is such that it can cope but it is in principle undesirable to have to rely on that flexibility to deal with a situation brought about by the terms of specific legislative or treaty provisions in the context of which the Scottish position should have been appreciated and taken into account.

The dominance of municipal law

The influence of the 1870 Act was not confined to domestic law. The key to understanding the UK's extradition treaty practice is section 4(2) of the 1870 Act, now consolidated in section 4(2) of the 1989 Act. So far as is relevant, that section provides that an Order in Council, giving effect to extradition arrangements (typically a treaty) "shall not be made unless the general¹²³ extradition arrangements to which it relates...are in conformity with the provisions of this Act and in particular with the restrictions on return contained in Part II...". At one level, of course, this simply reflects the impossibility of going, in subordinate legislation (such as an Order in Council), beyond the parameters set by the primary legislation¹²⁴. For the UK to negotiate a treaty which went beyond what was authorised by the municipal legislation would court adverse comment by the Joint Committee on Statutory Instruments¹²⁵ and a refusal by Parliament to give legislative effect to the treaty. Section 4(2) is the key to understanding the subject not because of what it prescribes but because it gives legislative expression to the

¹²² At 73.

¹²³ The word is used to distinguish the situation in which an extradition treaty or the like is concluded from that in which special arrangements are made for the extradition of a particular person to a particular requesting state in connection with a particular offence (as to which, see 105 below).

¹²⁴ See Bennion, *op cit*, 183.

¹²⁵ See Sir Donald Limon and WR McKay, *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 22nd edition, Butterworths 1997, 591.

approach which the UK has taken to extradition treaty-making. The starting point has always been municipal law, so that Lord Parker CJ was correct when he said in *R v Governor of Brixton Prison ex p Minervini*¹²⁶ (referring to the 1873 treaty with Norway and justifying the interpretation of that treaty in light of the municipal legislation), that "the two contracting parties in 1873 must have had in mind the Act of 1870 and the fact that an Order in Council would be made referring to the treaty and applying to it the provisions of the Act"¹²⁷. This approach, which gives pre-eminence to domestic law, indicates that, in relation to the bilateral treaties made under the 1870 Act (of which several remain in force) Gilbert's remark that "domestic legislation reflects treaty provisions"¹²⁸ does not describe UK practice accurately.

The extradition treaty with the United States of America

Introduction

We move now to consider aspects of some of the UK's international extradition arrangements. The principal arrangements to be considered are the treaty with the USA, ECE, the Commonwealth Scheme for the Rendition of Fugitive Offenders ("the Commonwealth Rendition Scheme") and Article 6 of the 1988 UN Drugs Convention. Certain other international obligations and arrangements will be considered incidentally.

We begin with extradition between the UK and the USA, which is dealt with under a treaty concluded in 1972 and incorporated into UK law by Order in Council in 1976¹²⁹. This treaty is the latest in a series which goes back to 1794¹³⁰. Until accession to ECE¹³¹, bilateral treaties of this sort were the norm for the UK's

¹²⁶ [1958] 3 WLR 559.

¹²⁷ At 563. It is not obvious why Norway would have had UK municipal primary legislation in mind, or why Norway should have been expected to understand the subtleties of UK secondary legislation. Contrast Dutch law, which provides that if a treaty is concluded which is inconsistent with the statute, the statute is to be amended, so that international law is said to take precedence (Bert Swart, "Extradition" in Bert Swart and André Klip (eds), *International Criminal Law in the Netherlands*, Max Plank Institut, 1997, 89-90).

¹²⁸ Geoff Gilbert, *Aspects of Extradition Law*, Martinus Nijhoff Publishers, 1991, 2.

¹²⁹ United States of America Extradition Order 1976 (SI 1976 No 2144).

¹³⁰ Michael Forde, *The Law of Extradition in the United Kingdom*, Round Hall Press, 1995, 23.

¹³¹ As to which, see 79 below.

international extradition arrangements (other than with the Empire and Commonwealth¹³²). Although, following Belgian ratification of ECE on 29 August 1997, the treaty with the USA is now the only bilateral treaty which retains practical importance¹³³ it was in the context of requests made under treaties such as this that UK extradition case-law developed; indeed a significant proportion of those cases concerned requests from the USA. The 1989 Act was drafted so as not to disturb existing bilateral extradition treaties left in place after accession to ECE and what amounts to a distinct procedural code was enacted for them in Schedule 1.

The pattern of the UK/US treaty is typical of extradition treaties of all kinds. It begins with an obligation to extradite and then prescribes the procedural steps which must be taken before extradition may be granted and the circumstances in which, even if the procedural requirements are met, extradition may not be granted. If the procedural requirements are met and the case is not brought within one of the specific exceptions, the requested State has no option but to surrender the fugitive or be in breach of its treaty obligation, no matter how hard the case might be.

There are 3 issues arising in relation to the UK/US extradition treaty which are of particular significance for our purpose. The first is the way in which the crimes for which extradition is available ("extradition crimes") are identified. The second is the restrictions which the treaty places on return, even for an extradition crime. And the third is the relationship between human rights law and international extradition law. In dealing with the third of these, we shall take the opportunity to summarise the relationship between international human rights law and criminal law more generally. Underlying all of this, however, is the fact that, despite the importance in practice of the treaty with the USA, there has been no Scottish jurisdiction as regards extradition requests from that country since at least 1870.

¹³² See 94 below.

¹³³ See JM Ferley, *Law and Procedure of Extradition*, Shaw & Sons, 1994, para 1.09.6.

Extradition crimes under the treaty

Article III of the treaty defines, by the enumerative method, the offences for which extradition is possible. They are those acts or omissions which disclose offences within any of the descriptions listed in the Schedule to the Treaty, provided that the offence is punishable under the laws of both Parties by imprisonment or other form of detention for more than a year or by the death penalty, that the offence is extraditable under UK law and that it constitutes a felony under US law.

The list of offences in the Schedule is strikingly similar to that in the First Schedule to the 1870 Act and uses Anglo-American legal categories. From the UK side, this is a product of the list in the First Schedule to the 1870 Act, which not only uses English law terms but which provides explicitly that the list of crimes "is to be construed according to the law existing in England...at the date of the alleged crime...". So it has been said that, "every one of the extradition crimes...are taken from English law, and everyone who is at all familiar with such subjects must be well aware of the fact that the definitions of crimes given in the law of England are peculiar to English law"¹³⁴. This contrasts with some UK practice before 1870. Clarke tells us that the 1852 treaty with France listed extradition crimes "by the names appropriate to them in the French penal code, in the law of the United Kingdom and, *where necessary, in that of Scotland*"¹³⁵. The use of English law terms in the UK/US treaty complicates extradition between Scotland and the USA in two ways, though neither is insurmountable.

The first relates to requests from Scotland. The need to formulate the request under reference to a list of offences drawn from English law renders the preparation of an extradition request from Scotland more complex than it need have been, though it does not appear that any Scottish extradition request has failed because of confusion caused by this. The second relates to extradition from Scotland and the fact that in such a case the double criminality requirement is

¹³⁴ Stephen, J in *R v Jacobi and Hiller* (1881) 46 LTR 592 at 595.

¹³⁵ Emphasis added.

applied under reference to English law.

That requirement, set out in Article III(1)(a), has to be read under reference to Article I, under which the obligation to extradite arises in relation to a fugitive "found" in the territory of the requested party. Suppose the fugitive is arrested in Edinburgh. No Scottish court has any applicable extradition jurisdiction. The extradition proceedings take place in London (usually at Bow Street Magistrates' Court) and are subject to review in the English courts¹³⁶. The fugitive arrested in Edinburgh and being dealt with in London has not been found in England. He has been taken there under compulsion¹³⁷. The double criminality test is applied according to English law. The magistrate and the English appellate courts are in no position to apply the law of Scotland, even though that is where, on this example, he is found. Indeed, paragraphs 5 and 7 of Schedule 1 to the 1989 Act, which provide for warrants and committal respectively, insist that it is English law which must be applied. The obvious conclusion is that those who negotiated the treaty simply forgot about, or ignored, the existence of Scots law. The practice which the 1989 Act perpetuates of dealing in London with the extradition of persons sought by the USA does not merely prevent the fugitive from having recourse to the courts of the jurisdiction in which he has been arrested, namely Scotland. It also means that the legal test applied in his case will not be that which would have applied in the jurisdiction in which he was arrested.

There is no record of any fugitive taking this point and it is not clear on what basis it could be taken. The procedure under which the fugitive is dealt with in London is that which was prescribed by the 1870 Act and is now prescribed by

¹³⁶See 126 below.

¹³⁷ It is recognised that in *R v Larsonneur* (1933) 24 Cr App R 74 the English Court of Appeal held that a woman deported from Ireland and brought under arrest to Holyhead by the Irish police was "found" in the United Kingdom in contravention of the Aliens Order 1920; but that case has been "almost universally condemned" (CHW Gane and CN Stoddart, *A Casebook on Scottish Criminal Law*, 2nd edition, W Green & Son, 1988, 56), Gordon commenting that the decision is "ludicrous, one might almost say ingenuous" (GH Gordon, *The Criminal Law of Scotland* 2nd edition, W Green and Son Ltd, 1978, 288). See, however, D Lanham, "*Larsonneur* Revisited" [1976] Crim LR 276 and Rakesh C Doegar, "Strict Liability in Criminal Law and *Larsonneur* Reassessed" [1998] Crim LR 791 for another view.

the 1989 Act¹³⁸ and an objection to what the legislation prescribes is scarcely worth making. There might be a question whether the denial of recourse to a court in the jurisdiction in which the person is arrested (Scotland) is a breach of Article 5 ECHR but that question is quite difficult to answer, because of the unique constitutional nature of the UK and because of the fundamental irrationality of the arrangement which sees fugitives arrested in Scotland taken to England for the extradition hearing. No other Council of Europe member State has faced the problem. It may be said, however, that the purpose of the Article 5(3) ECHR requirement that an arrested person should be brought before a judge is so that it may be decided, by reference to legal criteria, whether there are reasons to justify detention and so that the detained person may be released if there are no such reasons¹³⁹. It is noticeable that ECtHR thinks in terms of review of the detention, which is a continuing state. It does not think in terms of reviewing the legality of the arrest. The English court of committal is not, then, reviewing something which happened in Scotland but rather a state of affairs which exists in England and has been brought about by the explicit words of the statute. The mischief at which Article 5(3) is aimed-arbitrary imprisonment-is met by the present system. It is, therefore, doubtful whether a breach of ECHR could be made out simply by virtue of the taking of the fugitive to London. Nevertheless, the 1985 Green Paper noted that it is unsatisfactory that a person arrested in Scotland should be denied recourse to the Scottish courts¹⁴⁰ and the 1989 Act corrected that situation for most cases. The 1985 criticism continues to apply with full force as regards the arrangements with the USA.

Although the definition of extradition crime in the Treaty begins with the enumerative method, it goes on (unusually) to apply eliminative criteria. The offence must be punishable by imprisonment for more than one year, be extraditable under UK law and be a felony in US law¹⁴¹. Because the Treaty is

¹³⁸ Section 1(3) and Schedule 1 para 5(3).

¹³⁹ *Scheisser v Switzerland* (1979-80) 2 EHRR 417.

¹⁴⁰ See 31 above.

¹⁴¹ Article VII(2)(d)(ii) requires the provision of a statement that the matter is a felony.

incorporated by Order in Council, it is beyond doubt that it may be invoked in UK courts and that some of those courts are entitled to seek to construe it¹⁴². However, their efforts to do so offer further evidence of the lack of facility with which domestic courts interpret treaties.

The understanding which the English courts have of the provision was first articulated in *Government of the United States of America v Jennings and Another*¹⁴³. In that case, a British woman driving in California had collided with another car, driven off at speed and, in the course of her flight, knocked down a 13 year old cyclist. She was charged with "felony drunk driving". In breach of a condition of bail, she left the USA and returned to the UK. When the cyclist died from his injuries, there was substituted a charge of manslaughter. This was a felony and carried a potential penalty of three years' imprisonment. The USA sought her extradition.

The point with which the House of Lords was principally concerned was whether the creation of the statutory offence of causing death by reckless driving¹⁴⁴ had meant that conduct such as that of the accused no longer amounted to manslaughter in English law. This had nothing directly to do with extradition law but did affect the answer to the question whether there was double criminality in respect of a listed offence (namely manslaughter). The House concluded that such conduct could still amount to manslaughter where it occurred in England.

The meaning of Article III(1) of the Treaty was not analysed in *Jennings*. Lord Roskill simply asserted that there were four prerequisites to a successful application, these being first that the crime was one of those listed, secondly that the offence was punishable under the laws of both countries with imprisonment for more than one year, thirdly that the offence was a felony in US law and fourthly that the *prima facie* case requirement was satisfied. He then proceeded to apply these prerequisites, holding in the event that they were all satisfied and

¹⁴² But see 124 below on the position of the court of committal.

¹⁴³ [1982] 3 WLR 450; also reported at [1983] 1 AC 624 *sub nom R v Governor of Holloway Prison ex p Jennings*.

¹⁴⁴ Then dealt with under the Road Traffic Act 1972 s1.

restoring the stipendiary magistrate's order committing the accused for return. Lords Bridge of Harwich and Brightman concurred without making separate speeches. Since this is not the only possible construction of the treaty provision, the failure of the House of Lords to arrive at its interpretation by a process of reasoning is unsatisfactory. The relationship between international law and criminal law should not depend on assumptions.

Lord Roskill's approach to the treaty was affirmed in *Government of the United States of America v McCaffery*¹⁴⁵, in which Lord Diplock said, citing *Jennings* but still without analysing the treaty provision, that "the requirements of paragraphs (a) and (c) must be satisfied as respects offences listed in the schedule to the treaty as well as respects any other offence".

The position adopted in these two cases as to the meaning of the Treaty is undeniably tenable; but it does not proceed on any reasoned basis. It concentrates on a close reading of the language and its effect is to superimpose the eliminative method upon the enumerative so that both must be satisfied. By demanding that both enumerative and eliminative tests should be satisfied the House made extradition more difficult under the treaty with the USA than under any other extradition arrangement. To be sure, it is likely that the penalties available for offences listed in the treaty will satisfy the eliminative test. That is not the point. The fact that a hurdle may be cleared without undue difficulty does not mean that it ceases to be a hurdle and the approach which the House took does affect the content of incoming extradition requests to the extent that it must now be established in every case that the offence is a felony in US law.

From a US perspective, Molner at least has a different understanding of the treaty. He writes that "Under the 1972 Treaty, the United States and the United Kingdom must extradite individuals accused of a wide range of scheduled offenses *or* any offense, attempt or conspiracy which is punishable in each country by more than one year in prison (or death) and is both a felony under

¹⁴⁵ [1984] 1 WLR 867.

United States law and extraditable under United Kingdom law"¹⁴⁶. There is a case for the proposition that Molner is right and the House of Lords wrong. One of the problems which the 1974 Working Group recognised with the use of the enumerative method was its inherent lack of flexibility; they thought that this could be overcome by the use of a provision which then formed part of the UK's model extradition treaty and which provided that extradition might also be granted, at the discretion of the requested party, for any other offence if that offence would, according to the law of both parties, be extraditable¹⁴⁷. Although it does not conform to the wording of that particular model, Article III(1), understood as Molner understands it, would achieve the same result. The alternative position, which represents the law of England and which, because extradition requests from the USA are all dealt with under English law, would apply equally to a fugitive found in Scotland, has been reached without any obvious reasoning process.

We have noted above that the English courts have erected the analogy between treaties and contracts into a canon of interpretation¹⁴⁸. We have also noted that in *Fininvest* the court referred to an unincorporated treaty without going through any process of reasoning to justify the making of such reference. In *Jennings* and in *McCaffery* we see once again that courts have taken a stance on the meaning of a treaty without going through any reasoning process. In terms of what courts actually do, it seems that Gardiner was excessively kind when he wrote that there has been cherry picking from the Vienna principles¹⁴⁹. Courts dealing with international criminal law treaties, on the evidence of *Arton*, *Beese*, *Postlethwaite*, *Fininvest*, *Jennings* and *McCaffery* do not seem to apply any overt process of reasoning to the use and interpretation of those treaties. The emphasis of the Vienna rules on the ordinary meanings of words in their context will often

¹⁴⁶ See TE Molner, "Extradition: Limitation of the Political Offence Exception" 27 *Harvard International Law Journal* 266 (1986) (emphasis added).

¹⁴⁷ *Op cit*, 23.

¹⁴⁸ 18 above.

¹⁴⁹ *Loc cit*.

mean that no harm is done; but as the contrast between Molner's interpretation of Article III(1) of the UK/US Extradition treaty and that of the House of Lords demonstrates, there will be occasions on which there is a material difference.

Restrictions on extradition

Article V begins by providing that extradition is not to be granted if the person sought would, if proceeded against in the territory of the requested party for the offence for which his extradition is requested, be entitled to be discharged on the ground of a previous acquittal or conviction in the territory of the requesting or requested Party or of a third state. Although not specifically provided for by the 1870 Act, it was held in *Atkinson v United States Government*¹⁵⁰ that this represents a plea available to the fugitive arising out of the magistrate's ordinary powers in dealing with a committal hearing¹⁵¹. In the case of a fugitive arrested in Scotland and transported to Bow Street the effect must be that the main thrust of the court's consideration will be directed to the English law rules relating to *autrefois acquit* and *autrefois convict* rather than to the (in the circumstances, more appropriate) Scots law rules relating to *tholed assize*¹⁵². In many cases, however, the practical outcome will be the same; and no-one seems to have tried to take the point.

Article V(1)(c) of the treaty deals with the political offence exception, which requires to be considered in the light of the 1985 Supplementary Treaty between the UK and the USA¹⁵³. It represents an area in which UK extradition law, expressed in the case law of the English courts, has made an identifiable contribution to wider international extradition law.

The Article provides that "extradition shall not be granted if...the offence for which extradition is requested is regarded by the requesting state as one of a political character". This compares with section 3(1) of the 1870 Act, which

¹⁵⁰ [1971] AC 197.

¹⁵¹ See especially Lord Reid at 231G.

¹⁵² See further 160 below.

¹⁵³ Supplementary Treaty concerning the Extradition Treaty between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland signed at London on 8 June 1972, 1985.

provided, *inter alia*, that “a fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character...”.

The political offence exception is well-nigh global in its coverage, though no fully satisfactory definition of it exists¹⁵⁴. Understandings of its scope vary from legal system to legal system. Van der Wilt notes¹⁵⁵ that the political incidence test, developed by the English courts in *re Castioni*¹⁵⁶ has exercised considerable influence in the common law world¹⁵⁷. The Scottish courts have not so far had an opportunity to consider the point. It should therefore be kept in mind in reading the following account of the political offence exception that, in seeking from the USA the extradition of a fugitive whose crime was arguably political, Scotland would require to work within a treaty and conceptual framework to which Scots law has not contributed; and that a fugitive found in Scotland would be taken to London and there dealt with under that same framework.

The political incidence test as formulated in *Castioni* required that the crimes should be incidental to and form part of political disturbances. During the 1970s, however, in cases in which US courts upheld the political offence exception in relation to alleged members of the Provisional IRA¹⁵⁸, it became clear that US law still applied *Castioni* in a somewhat undeveloped way¹⁵⁹. In a series of cases¹⁶⁰ the English courts had tried to address the fact that the political

¹⁵⁴ See Harmen van der Wilt, *op cit*; and the remarks of Viscount Radcliffe in *Schtraks v Government of Israel* [1964] AC 556 at 589.

¹⁵⁵ *Op cit*, 29-35.

¹⁵⁶ [1891] 1 QB 149.

¹⁵⁷ Van der Wilt also notes (*op cit*) that the proportionality theory developed by the Swiss courts has had similar influence on the civilian systems.

¹⁵⁸ See TE Molner, *op cit*; William M Hannay, "An Analysis of the US-UK Supplementary Extradition Treaty" 21 *International Lawyer* 925, 926 (1987); Michael P Scharf, "Foreign Courts on Trial: Why US Courts Should Avoid Applying the Inquiry provision of the Supplementary US-UK Extradition Treaty" 25 *Stanford Journal of International Law*, 257 (1988-89).

¹⁵⁹ *Op cit*, 927.

¹⁶⁰ Van der Wilt, *op cit*, 31; *R v Governor of Brixton Prison, ex parte Kolczynski and Others* [1955] 2 WLR 116. See generally Chapman J's account of the development of the concept in *In re Extradition Act 1870, ex parte Treasury Solicitor* [1969] 1 WLR 12 and the fuller accounts given in chapter 6 of Geoff Gilbert, *Aspects of Extradition Law*, Martinus Nijhoff Publishers, 1991 and chapter 6 of Alun Jones, *Jones on Extradition*, Sweet & Maxwell, 1995.

offence exception has in this century come to be prayed in aid by terrorists seeking to undermine democracy rather than the liberal idealists for whose benefit it was first developed¹⁶¹.

In the mid 1980s both the US and the UK, for reasons associated with difficulties with terrorist groups, found it desirable to limit the ambit of the political offence exception. From the UK point of view, it was the problem of terrorism in connection with the affairs of Northern Ireland and the difficulties which would arise if the USA was to become a safe haven for terrorists which prompted the Supplementary Treaty. The UK had already agreed the limitation of the political offence exception in a Council of Europe context in the European Convention on the Suppression of Terrorism 1977¹⁶², though reservations by other States Parties rather limited the effect of that instrument. From the US perspective, the negotiation of the Supplementary Treaty was part of a wider response¹⁶³ to increasing terrorist activity against Western democratic countries, involving attempts to negotiate similar treaties with other such countries¹⁶⁴ and in some circumstances the claiming of extraterritorial criminal jurisdiction on the basis of the passive personality principle¹⁶⁵.

Both countries, then, were engaged in attempting, through their municipal laws, to deal with terrorism. Treaties such as the Supplementary Treaty and the

¹⁶¹ Van der Wilt, *op cit*, 26. See also Bradley G Kulman, "Eliminating the Political Offense Exception for Violent Crimes: The Proposed United States-United Kingdom Supplementary Extradition Treaty" 26 *Virginia Journal of International Law* 755, 757 (1986) and John Patrick Groarke, "Revolutionaries Beware: The Erosion of the Political Offense Exception Under the 1986 United States-United Kingdom Supplementary Extradition Treaty" 136 *University of Pennsylvania Law Review* 1515 (1988).

¹⁶² Not further considered in this thesis.

¹⁶³ Including calls by the American Bar Association for the exclusion of terrorist crime from the political offence exception (American Bar Association Section of International Law and Practice, "Report on United States-United Kingdom Extradition Treaty" 21 *International Lawyer* 271 (1987)).

¹⁶⁴ Groarke, *op cit*, ("Revolutionaries Beware..."), 1515; Kulman, *op cit*, ("Eliminating the Political Offense Exception for Violent Crimes..."), 756; but the results of negotiations with countries other than the UK have been described as "mixed"-see Douglas Stringer and Diane Marie Amann, "International Criminal Law: The US-UK Supplementary Extradition Treaty and the Political Offense Exception" 31 *International Lawyer* 622, 623, n89 (1997).

European Convention on the Suppression of Terrorism represent the international law side of a struggle which was also reflected in developments in municipal law.

As negotiated, the Supplementary Treaty provided¹⁶⁶ that, for the purpose of the treaty, none of a list of types of offence were to be regarded as offences of a political character. These included offences established under certain multilateral conventions, murder, manslaughter and assault causing grievous bodily harm¹⁶⁷, and offences involving bombs, firearms or incendiary devices if any person was endangered. To this extent, the Supplementary Treaty stood firmly in the tradition of the European Convention on the Suppression of Terrorism. However, and notwithstanding the US Administration's view that the Supplementary Treaty represented "a significant step in improving law enforcement and combating terrorism"¹⁶⁸, the difficulties which it faced during the US ratification process were considerable, essentially because of doubts expressed about the fairness of the "Diplock Courts", which sit without a jury¹⁶⁹. By way of a compromise, an additional Article was added to the treaty by the US Senate, whereby extradition is not to occur if the fugitive establishes "to the satisfaction of the competent judicial authority by a preponderance of the evidence that the request for extradition has in fact been made with a view to try or punish him on account of his race, religion, or political opinions, or that he would, if surrendered, be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinions". This, it is said, echoes US civil rights and asylum statutes¹⁷⁰ but it also echoes the wording of Article 33 of the Convention Relating to the Status of Refugees 1951 and of paragraph 10(2) of the Commonwealth Rendition Scheme. A similar test had been

¹⁶⁵ Omnibus Diplomatic Security and Anti-terrorism Act 1986 (US), enacted following the murder of a US citizen aboard a foreign registered ship, the *Achille Lauro*, hijacked thousands of miles from US waters by middle eastern terrorists.

¹⁶⁶ Article 1.

¹⁶⁷ "Manslaughter" and "grievous bodily harm" are, of course, terms used in English law but not in Scots law. It is questionable whether culpable homicide and assault to severe injury are precisely equivalent to them.

¹⁶⁸ See Letters of Transmittal to the US Senate, 24 ILM 1104 (1985).

¹⁶⁹ Scharf, *op cit*, ("Foreign Courts on Trial"), 264.

applied by the UK extradition legislation in dealing with those subject specific multilateral conventions by which the UK accepts an obligation to extradite to states with which it would not necessarily do general extradition business¹⁷¹. The original provision was not, therefore, innovative and (since even in one of the cases which prompted the negotiation of the Supplementary Treaty, the US judge concerned expressed the view that "both Unionists and Republicans who commit offenses of a political character can and do receive fair and impartial justice"¹⁷²) it was unlikely to undermine the object of the treaty which was to achieve the surrender of terrorists¹⁷³.

The political offence exception demonstrates how the decision of an English court on the meaning of a concept found in both legislation and treaties has influenced the understanding which other common law states have of that concept. Where the law of the influenced state treats English law as merely persuasive, developing understandings of the concept may change from that common starting point. This meant, in the case of the political offence exception, that US courts, founding on the English case of *Castioni*, held that the exception applied, even though the English understanding of that case and the development of the English case law would have led to a different conclusion. In order to reconcile these differences, the two Governments adopted an approach first elaborated in a multilateral European treaty but US legislators, anxious about aspects of UK municipal law, qualified that treaty with words found in other multilateral treaties and in the municipal laws of both states. The interpenetration

¹⁷⁰ Douglas Stringer and Diane Marie Amann, *op cit*, 624.

¹⁷¹ Internationally Protected Persons Act 1978 ss3 & 3A; Civil Aviation Act 1982 s934(1)-(3); Taking of Hostages Act 1982 ss3A & 4; Aviation Security Act 1982 s9A; Nuclear Material (Offences) Act 1983 s5A.

¹⁷² *In re Doherty* 599 F Supp 270 (SDNY 1984) at 276, *per* Judge Sprizzo.

¹⁷³ *In Matter of Requested Extradition of Smyth* 61 F 3d 711 (9th Cir 1995) a panel of the US Court of Appeals for the Ninth Circuit construed the treaty defence narrowly, specifically so as to avoid frustrating the overall purpose of extradition treaties, which they characterised as being to facilitate criminal prosecution and punishment. The Court required an individualised inquiry which depended not on general evidence of political violence and persecution in Northern Ireland but on evidence showing that the particular fugitive would be disadvantaged because of his religious or political status. This is, of course, a very difficult burden to meet and the decision in *Smyth* has been criticised on that ground (Stringer and Amman, *op cit*, 625).



of international and municipal law in this process is substantial.

Extradition and human rights

Introduction

In 1992 the organisers of a Max Planck Institute workshop dubbed human rights law the “Third Dimension” in international criminal law¹⁷⁴. We have noted above the protective aspect of extradition law¹⁷⁵. The UK/USA extradition treaty provided the context for ECtHR to decide *Soering v United Kingdom*¹⁷⁶, one of its most significant cases. *Soering* makes it clear that international human rights law can impose limits on what States do under their extradition treaties but does not make it clear how far it can do so. We shall examine that case, and others like it, below; but first it is necessary to set out the basics of the relationship between the ECHR and Scots law.

We have seen already that it was under reference to ECHR that much of the law on the use of unincorporated treaties as an aid to the interpretation of statute developed¹⁷⁷. We have also seen that it is only recently that the Scottish courts have even been prepared to go that far. Murdoch has demonstrated that a lack of awareness of the content and possibilities of ECHR amongst Scots practitioners has led to a situation in which, for all its vaunted continental roots, Scots law has hitherto accorded ECHR a standing which is in fact weaker than the standing which it enjoys in any other Western European legal system¹⁷⁸.

The 1998 legislation

All of this is in the process of change, driven by HRA and sections 29 and 57 of the Scotland Act 1998. According to the White Paper, *Rights Brought Home: The Human Rights Bill*¹⁷⁹, “the essential feature of the [Act] is that the United

¹⁷⁴ See Stephan Breitmöser, “Report on the Proceedings of Session IV” in Albin Eser and Otto Lagodny (eds), *Principles and Procedures for a New Transnational Criminal Law*, Max Planck Institute, 1992, 689.

¹⁷⁵ See 34.

¹⁷⁶ (1989) 11 EHRR 439.

¹⁷⁷ See 24-28.

¹⁷⁸ Jim Murdoch, “Scotland and the European Convention”, in Brice Dickson (ed), *Human Rights and the European Convention*, Sweet & Maxwell, 1997, 113.

¹⁷⁹ Cm 3782, October 1997.

Kingdom will not be bound to give effect to the Convention rights merely as a matter of international law, but will also give them further effect directly in our domestic law"¹⁸⁰. Hitherto the UK system "has been one of negative rights and prohibitions built into the common law-the 'electric fence approach' as it has been called"-rather than the system of positive rights and freedoms built into the Convention"¹⁸¹. So far as other international human rights instruments are concerned (of which the chief is the International Covenant on Civil and Political Rights 1976-"ICCPR"), the law remains unchanged. Those instruments to which the UK is party may be used as tools for the interpretation of a statute which is ambiguous. That having been said, the double constraints of non-incorporation and UK refusal to ratify the Optional Protocol to ICCPR which would give a right of individual petition to the Human Rights Committee, have so far kept ICCPR "in the shadows" in the UK¹⁸². It is clear that the Government intends it to remain so¹⁸³.

HRA seeks to achieve its objective in two principal ways. By section 3(1), "so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights". And by section 6(1), "it is unlawful for a public authority to act in a way which is incompatible with one or more of the Convention rights". Section 6(1) will undoubtedly inform and constrain the practices of Scottish Courts and Scottish prosecutors. Its importance is considerable and the way in which they will work out in practice is as yet unknown¹⁸⁴. Lord Reed has suggested that one consequence will be the development of the common law in a way which is

¹⁸⁰ Para 2.1.

¹⁸¹ Lord Hope of Craighead, *op cit*, 369.

¹⁸² Rosalyn Higgins, "Ten Years on the UN Human Rights Committee: Some Thoughts upon Parting" [1996] EHRLR 570, 576.

¹⁸³ See the recent debate on the issue in the House of Lords (HL Debs Vol 600 No 81, 12 May 1999, Cols 1276 to 1290).

¹⁸⁴ See the general speculations in Alan Miller, "Human Rights and the Scottish Parliament " [1998] EHRLR 260.

consistent with ECHR¹⁸⁵. If that is correct, it would produce in the common law an effect parallel to HRA section 3(1), which represents a significant development in the relationship between treaties and municipal law. There will no longer merely be a presumption that a statute is intended to be in conformity with ECHR and it will no longer be necessary to find an ambiguity before reference can be made to ECHR. Instead, there will be a positive requirement to construe a statute so that it is in conformity unless the legislation is so clearly incompatible with the Convention that it is impossible to do so¹⁸⁶. As Lord Steyn has summarised the nature of the change: "Traditionally the search has been for the one true meaning of a statute. Now the search will be for a possible meaning that would prevent the need for a declaration of incompatibility. The questions will be: (1) What meanings are the words capable of yielding? (2) And, critically, can the words be made to yield a sense consistent with Convention rights? In practical effect there will be a rebuttable presumption in favour of an interpretation consistent with Convention rights. Given the inherent ambiguity of language the presumption is likely to be a strong one"¹⁸⁷. In some cases, the need to find an alternative meaning which will be consistent with ECHR might lead the courts into seeking latent ambiguities in a way which they are not otherwise entitled to do¹⁸⁸. Moreover, the rule that reference may only be made to unincorporated treaties where there is ambiguity on the face of the statute will in future, it is thought, have to be recast so that such reference is permissible only where the statute remains ambiguous even when read in light of ECHR. And there is no guidance yet about what is to be done when ECHR and other relevant treaties conflict¹⁸⁹.

There is considerable force in Ovey's assertion that "no Article of the Convention is without implications for criminal law, if only to the extent that the

¹⁸⁵ Lord Robert Reed, "Taking Human Rights Seriously", lecture given at University of Aberdeen, 11 May 1999 (writer's notes).

¹⁸⁶ Lord Irvine of Lairg, "The Development of Human Rights in Britain under an Incorporated Convention on Human Rights" [1998] PL 221, 228.

¹⁸⁷ Lord Steyn, "Incorporation and Devolution-A Few Reflections on the Changing Scene" [1998] EHRLR 153, 155.

¹⁸⁸ See 27-28 above.

existence or non existence of criminal sanctions may give rise to a violation of the right safeguarded"¹⁹⁰. Even if it is correct to maintain that the fact that Article 6 ECHR (for example) is focused narrowly on the trial process rather than on criminal justice as a whole, and is therefore relatively limited in its impact¹⁹¹, the emphasis must be on the word "relatively". A very large part of the jurisprudence of ECtHR and of the European Commission of Human Rights ("EComHR") has related to Articles 5, 6, 7 and 8 as they affect criminal cases. Dennis has argued that the increasing willingness of the Court and the Commission to pronounce on matters of criminal evidence and procedure "indicates the arrival of more detailed pan-European norms of criminal process"¹⁹². The effect of HRA in relation to criminal law will be at least as significant as its effect in any other area of law.

Moreover, section 2(1) HRA requires, that "a court or tribunal determining a question which has arisen in connection with a Convention right must take into account" the Convention case-law, including the case-law of ECtHR. Ashworth has noted that "the Convention text should not be read as it stands, without reference to the jurisprudence of the European Court"¹⁹³. HRA therefore requires that UK courts should interpret a statute in a way which is in conformity with a treaty and should, in so doing, have regard to the case law of an international court whose task it is to interpret that treaty. It follows that UK courts, including Scottish criminal courts, will henceforth require to work within a framework which includes international law. This does not, however, mean that international law will have a dominant position. It was the Government's clear policy, in enacting HRA, not to interfere with the doctrine of Parliamentary sovereignty. The Government's expectation when a court finds it impossible to find an

¹⁸⁹ As to which, see the discussion of *Soering v United Kingdom* at 63 below.

¹⁹⁰ Clare Ovey, "The European Convention on Human Rights and the Criminal Lawyer: An Introduction" [1998] Crim LR 4, 6. See also David Feldman, "The Developing Scope of Article 8 of the European Convention on Human Rights" [1997] EHRLR 265.

¹⁹¹ See Sybil Sharpe, "The European Convention: A Suspect's Charter?" [1997] Crim LR 848.

¹⁹² IH Denis, "Human Rights and Evidence in Adversarial Criminal Procedure: The Advancement of International Standards", in JF Nijboer and JM Reijntjes (eds), *Proceedings of the First World Conference on New Trends in Criminal Investigation and Evidence*, Koninklijke Vermande bv/Open University of the Netherlands, 1997, 523.

interpretation of a piece of legislation which is consistent with the Convention rights is clear. At Second Reading of the Human Rights Bill in the House of Lords, the Lord Chancellor said that "the Bill does not allow the courts to set aside or ignore Acts of Parliament" and that section 3 "preserves the effect of primary legislation which is incompatible with the Convention"¹⁹⁴. Later in the same debate, he said that the intention of the legislation was to maximise the protection to individuals "while retaining the fundamental principle of Parliamentary sovereignty"¹⁹⁵. The remedy provided for the situation in which a court cannot find a way to construe legislation compatibly with the Convention rights is the declaration of incompatibility, which will not affect the validity, continuing operation or enforcement of the provision in respect of which it is given and which will not bind the parties to the proceedings in which it is made¹⁹⁶. Such a declaration might well prompt the Government to make legislative change but will not oblige it to do so. This, it is suggested, is absolutely consistent with the rule in *Salomon* that, when treaty and statute conflict, statute wins.

There is a further, rather subtler, way in which HRA might well mediate international law into UK and Scots law, though it is important that it should not be over stated. ECtHR is accustomed to reasoning within the context of the Council of Europe and sometimes bases its decisions in part on what it perceives to be the current goals of the Member States¹⁹⁷. Those goals are expressed, *inter alia*, in Recommendations of the Committee of Ministers and, perhaps pre-eminently, in the Council of Europe's multilateral treaties, many of which apply to the criminal law field (and especially to international co-operation)¹⁹⁸. In *Chinoy v*

¹⁹³ Andrew Ashworth, "Article 6 and the Fairness of Trials" [1999] Crim LR 261, 271.

¹⁹⁴ HL Debs, 3 November 1997, cols 1230-1231.

¹⁹⁵ HL Debs, 3 November 1997, col 1294.

¹⁹⁶ Human Rights Act 1998 s4(6).

¹⁹⁷ See, for example, the Court's use of the goal of the advancement of the equality of the sexes in *Burghartz v Switzerland* Series (1994) 18 EHRR 101, 116.

¹⁹⁸ See Hans G Nilsson, "The Council of Europe Laundering Convention: A Recent Example of a Developing International Criminal Law", in Albin Eser and Otto Lagodny (eds), *Principles and Procedures for a New Transnational Criminal Law*, Max Planck Institute, 1992, 457; Peter Csonka, "Corruption: The Council of Europe's Approach" in Barry AK Rider (ed), *Corruption: The Enemy Within*, Kluwer, 1997, 343; and Peter Csonka, "Organised and Economic Crime: (an

*United Kingdom*¹⁹⁹, EComHR took account of the “international campaign against the drugs trade and the laundering of the proceeds of drug trafficking” in finding no breach of Article 8 ECHR in connection with the detention of the accused for extradition (where the evidence against him included tape recordings of his conversations made illegally in France by US agents).

ECtHR could not, of course, overtly apply treaties other than ECHR. Apart from other considerations (such as the inability of individuals to invoke treaties and the political consequences liable to follow any overt reference by the Court to a treaty to which a given respondent State was not actually party), the Court has only the jurisdiction conferred on it by ECHR-and that does not extend to other treaties. Nevertheless, it is perhaps possible to perceive in cases such as *Raimondo v Italy*²⁰⁰ some grounds for believing that the approach of the Court will sometimes be influenced by other Council of Europe conventions. The case was decided in February 1994, less than six months after the coming into force (on 1 September 1993) of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime 1990 (“the Laundering Convention”). Italy was a signatory to the Laundering Convention but had not at that time ratified. The applicant, who had been charged with being a member of a mafia type organisation, attempted to argue that seizure and confiscation of his assets prior to trial²⁰¹ violated his property right under Article 1 of Protocol 1. Such action is, however, positively required by Article 3 of the Laundering Convention. ECtHR, which is normally courteous and forbearing to a fault with undeserving applicants²⁰², rebuffed *Raimondo* on that point in language which was robust and uncompromising. It seems reasonable to think that the Court's remarks were made against the background of knowledge of the

Overview of the Relevant Council of Europe Activities)” in Peter J Cullen and William C Gilmore (eds), *Crimes sans Frontières*, David Hume Institute/ Edinburgh University Press, 93.

¹⁹⁹ 15199/89, 4 September 1991.

²⁰⁰ (1994) 18 EHRR 237.

²⁰¹ They were returned on his acquittal.

²⁰² See, for example, the dead-pan way in which they dealt with the litigious and intemperate applicant in *Ravnsborg v Sweden* (1994) 18 EHRR 38.

Laundering Convention and its requirements. They said that such seizures were provisional measures of a sort which were justified by the general interest and that, in view of the economic power of organisations like the Mafia, it could not be said to be disproportionate. The Court said that it was fully aware of the difficulties encountered by Italy in the fight against the Mafia and that confiscation is an effective and necessary weapon "against this cancer". For the Court to have decided otherwise would have been to undermine the whole basis of the Laundering Convention. Reference may be made again to the stress laid in *Chinoy*²⁰³ on the international campaign against the laundering of the proceeds of drug trafficking. That case was dealt with in 1991, shortly after the adoption of the Laundering Convention but before it entered into force.

If, then, ECtHR is sometimes influenced in what it does by other Council of Europe Treaties and if HRA requires UK courts to take account of the jurisprudence of ECtHR (as it does), it follows that, at least at the level of general policy, the approach of those other treaties may be mediated subliminally into UK law.

HRA will enter into force on 2 October 2000²⁰⁴. A more limited but more immediate incorporation of ECHR has taken place for Scotland as a result of sections 29(2) and 57(2) of the Scotland Act 1998. Section 29(1) provides that an Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Parliament and section 29(2)(d) provides that a provision is outside that competence if it is incompatible with any of the Convention rights. Section 57(2) provides that "a member of the Scottish Executive has no power to...do...any act...incompatible with any of the Convention rights". The expression "Convention rights" is defined as having the same meaning as in the Human Rights Act²⁰⁵. In terms of section 44(1)(c) of the Scotland Act, the Lord Advocate is a member of the Scottish Executive (as is the Solicitor General). It follows that any act of the Scottish Parliament which is

²⁰³ *Supra*.

²⁰⁴ HC Written Answer by Home Secretary, 18 May 1999, Col 293.

incompatible with the Convention rights will be capable of being challenged and that any act of the Lord Advocate which is incompatible with the Convention rights will be *ultra vires* and capable of being challenged. These provisions took effect on 20 May 1999²⁰⁶. To the extent that Acts of the Scottish Parliament deal with criminal law and procedure and to the extent that the Lord Advocate discharges his core responsibility of the prosecution of crime, ECHR will have an immediate and important effect on Scots criminal law and practice²⁰⁷. That having been said, extradition is a matter reserved to Westminster²⁰⁸ and will not therefore be affected directly by the Scotland Act provisions.

ECHR and extradition

The UK's participation in ECHR does not subject its extradition law to international law influence to the extent one might at first expect. There is, as ECtHR said in *Soering*, no right in ECHR not to be extradited. Indeed, there is only one reference to extradition in ECHR²⁰⁹ and that reference does not create a right. On the contrary, it qualifies the Article 5 right to liberty and security of person by specifying detention with a view to extradition as one of the permitted exceptions to the rule that persons are not to be deprived of their liberty. This is not to say that there is no role for ECHR in relation to extradition; but that role is a somewhat indirect one. As the Court went on to say in *Soering*, "in so far as a measure of extradition has consequences adversely affecting the enjoyment of a Convention right it may, assuming the consequences are not too remote, attract the obligations of a Contracting State under the relevant Convention guarantee"²¹⁰. Accordingly, ECHR cases relating to extradition have tended to relate to the *way* in which a step in extradition has been carried out or to the consequences of extradition in the particular case where they are particularly prejudicial rather than to the mere fact of the taking of that step or to consequences which would found a

²⁰⁵ Scotland Act s126(1).

²⁰⁶ Scotland Act 1998 (Commencement) Order 1998 (SI 1998 No 3178).

²⁰⁷ At the time of writing, the provisions had not yet been construed by the Justiciary Appeal Court.

²⁰⁸ Scotland Act 1998 Schedule 5 Part II Head B11.

²⁰⁹ Article 5(1)(f).

²¹⁰ *Ibid*, para 85.

finding of breach if they occurred in a State Party to ECHR. Since the same considerations apply to deportation (and since deportation is sometimes used as a form of disguised extradition²¹¹), the cases on extradition and on deportation tend to proceed along such similar lines that the two subjects are often treated together²¹².

Attention has been called above to the fact that extradition has both co-operative and protective aspects²¹³. The protective aspects, albeit they might be intended primarily for the benefit of the requested state²¹⁴, serve the function of the protection of human rights. Since section 4(2) of the 1989 Act requires that treaties should be in conformity with the Act "and in particular with the restrictions on return" it is reasonable to characterise the appearance of those restrictions in treaties as a result of the influence of municipal law on international law. In UK practice, the political offence exception is the most obvious example of this phenomenon but an even clearer example exists in the civilian tradition. Many states from that tradition have in their municipal law a prohibition on the extradition of their own nationals. The reasons for that relate in part to the view that an alleged offender's national judges are the natural judges of his offence, in part to "a state's alleged duty to protect its own nationals and...the fear that a foreigner would be prejudiced at a trial in the locus delicti"²¹⁵ and in part, it seems, to concerns about substandard prison conditions in some requesting states²¹⁶. Accordingly Article 6 ECE gives states parties the right to refuse extradition of their own nationals and Article 4 of the UN Model Treaty on Extradition contains a similar provision. The *Manual* on the Model Treaty points out that municipal law might well turn this optional ground of refusal into a mandatory one²¹⁷. Both

²¹¹ See *Bozano v France* (1986) 9 EHRR 297.

²¹² And see Kemp's article arguing that refugee law should supercede the political offence exception (Susan L Kemp, "Refugee Law as a Source in Extradition Cases" [1998] Crim LR 774).

²¹³ Pages 33-34.

²¹⁴ *Ibid.*

²¹⁵ Gilbert, *Aspects of Extradition Law*, 96.

²¹⁶ John Dugard and Christine Van den Wyngaert, "Reconciling Extradition with Human Rights", 201.

²¹⁷ Para 66.

ECE and the Model Treaty reflect this and the civilian tendency to take jurisdiction on the active personality (or "nationality") principle²¹⁸ by applying an *aut dedere aut judicare* requirement in that situation.

So the inclusion in extradition treaties of restrictions on extradition will often reflect municipal law. To this it may be added that these safeguards are entirely dependent upon the terms of the treaty under which extradition is sought and that accepted wisdom persists in denying the common restrictions the status of customary norms²¹⁹. The human rights protections in municipal law therefore contribute to those aspects of conventional international law which are sufficiently common to find place in the UN Model Treaty but not to customary international law. However, the UK's extradition relationship with the USA has been the context in which it has become clear that ECHR (to which the USA is not, of course, Party) may have a significant effect on the application of the extradition Treaty. As soon as HRA enters into force it will also have a justiciable effect on what the Secretary of State does once a court of committal has found the fugitive liable to surrender.

EComHR considered extradition between the UK and the USA in *Kirkwood v United Kingdom*²²⁰ and ECtHR did so in *Soering*. It is necessary first, however, to take notice of *Altun v Federal Republic of Germany*²²¹ because that case laid the foundation for the approach which was taken in *Kirkwood* and *Soering*. In *Altun*, the proposed extradition involved two States that were both party to ECHR-Germany and Turkey. The latter country had not accepted the right of individual petition to EComHR at that time. The applicant asserted that if he was returned to Turkey he was at risk of torture. Turkey did not dispute that torture was a feature of Turkish prisons. It was clear that the applicant was at risk and also that he would have had no means of raising the matter with the

²¹⁸ European Committee on Crime Problems, *Extraterritorial criminal jurisdiction*, Council of Europe, 1990, 10.

²¹⁹ International Law Association, Committee on Extradition and Human Rights, *op cit*.

²²⁰ 37 DR 158 (1984).

²²¹ 36 DR 209 (1984).

Strasbourg organs if the risk had materialised after extradition.

ECHR may be regarded as well-nigh foundational within the structure of the Council of Europe. A State which aspires to membership of the Council of Europe must guarantee to everyone within its jurisdiction the enjoyment of human rights and fundamental freedoms²²². Extradition between Germany and Turkey was governed by a Council of Europe instrument-ECE. Given the foundational nature of ECHR within the Council of Europe and the absolute nature of Article 3 ECHR, and given too the very clear evidence of risk that the applicant would be treated in a manner inconsistent with Article 3, it is not surprising that EComHR, whilst recalling that “Increased co-operation as regards mutual assistance in legal matters is an area where Council of Europe activity has been fruitful” and insisting, as it was to do in other cases, that there must be some certainty that ill treatment would occur on return²²³, was able to give ECHR priority over the obligation to extradite and held the application in *Altun* to be admissible. However, when the Strasbourg organs came to deal with the UK’s extradition relationship with the USA, that high level of common ground was absent. The USA was not a member of the Council of Europe and the extradition treaty between the UK and USA is not a Council of Europe instrument. Nor did the USA concede for a moment that conditions in its prisons might breach relevant international human rights provisions.

In *Kirkwood*, EComHR was prepared to consider that the UK’s responsibility might be engaged but held that the threshold of certainty of ill-treatment was not reached. The applicant was arrested at Heathrow as the subject of an extradition request from the USA for a double murder in California, where the death penalty was available. An assurance was obtained that “should the applicant be convicted of ...murder...and if the death penalty is imposed... a representation will be made in the name of the United Kingdom that it is the wish

²²² *The Council of Europe: achievements and activities*, Directorate of Information, Council of Europe, 1993, 3.

²²³ See *X v Switzerland* 24 DR 205 (1981) and *Kozlov v Finland* 69 DR 321 (1991), in each of which the Commission said that Article 3 will only apply in “exceptional circumstances”

of the United Kingdom that the death penalty will not be carried out". The applicant was committed for return and the Secretary of State ordered his surrender. The applicant complained *inter alia* that, bearing in mind the probability of the imposition of the death penalty in the event of his conviction (having regard to his criminal record for offences of violence) and taking account of the automatic appeal procedure and consequent delays, his extradition to the USA would breach the guarantee against inhuman or degrading treatment or punishment in Article 3 ECHR. The Government argued that what happened to the applicant in the USA would be the sole responsibility of the USA and that the UK's involvement was insufficiently proximate to engage State responsibility. Although EComHR reaffirmed the rule in *Altun* that "if conditions in a country are such that the risk of serious ill-treatment and the severity of that treatment fall within the scope of Article 3 of the Convention, a decision to deport, extradite or expel an individual to face such conditions incurs the responsibility under Article 1 of the Convention of the Contracting State which so decides", it went on to hold that in the instant case the applicant had not been tried or convicted and the risk of his exposure to death row was uncertain. It had not been established that the treatment to which he might be exposed and his risk of such exposure were so serious as to breach Article 3 and the application was therefore inadmissible.

Soering v United Kingdom

In *Soering*, however, whilst recognising the importance of extradition²²⁴, the Court held that the UK's responsibility was engaged by the conditions in the USA to which it proposed to surrender the applicant.

Soering is usually discussed for its significance for the human rights obligations of the requested State in an extradition case. It is not intended to repeat here what has been written elsewhere about *Soering* and human rights

²²⁴ It said that there is a "search for a fair balance between the demands of the community and the requirement of the protection of the individual's fundamental rights...it is increasingly in the interest of all nations that suspected offenders who flee abroad should be brought to justice. Conversely, the establishment of safe havens for fugitives would not only result in danger for the State obliged to harbour the protected person but also tend to undermine the foundations of extradition".

law²²⁵. Rather, it is sought to call attention to the complexities which it illustrates in the relationship between international law and criminal law.

Put shortly, the facts were that the parents of the applicant's girlfriend had been murdered in Bedford County, Virginia in March 1985. The applicant was arrested in England in April 1986 in connection with a cheque fraud. Whilst in custody in England, the applicant made a statement in which he admitted the murders. The USA requested his extradition on charges, *inter alia*, of capital murder. After serving a prison sentence for the cheque fraud, the applicant was arrested pursuant to the extradition request. The UK sought an assurance that the death penalty, if imposed, would not be carried out. However, the only assurance which was forthcoming was similar to that in *Kirkwood*. The prosecutor would inform the sentencing court that it was the wish of the UK that the death penalty should not be imposed. It emerged later that he himself intended to seek the death penalty.

The Minister of State at the Home Office told the House of Commons that the undertaking received was in standard terms and that it represented a clear understanding that the death penalty would not be carried out²²⁶. That, however, was not what it said. Article IV of the Treaty provides explicitly that where the

²²⁵ The effect of *Soering* has been substantial. It defines ECHR law on the application of Article 3 to extradition and deportation. It has influenced the Judicial Committee of the Privy Council in *Pratt and Morgan v Attorney General of Jamaica* [1993] 4 All ER 769 (PC). And it has spawned a considerable literature, which includes: John Quigley and S Adele Shank, "Death Row as a Violation of Human Rights: Is It Illegal to Extradite to Virginia?" 30 *Virginia Journal of International Law* 189 (1989); Wilson Finnie, "Extradition and the Death Penalty" 1990 SLT (News) 53; Sharon A Williams, "Extradition to a State that Imposes the Death Penalty" 1990 *Canadian Yearbook of International Law* 117; Christine Van den Wyngaert, "Applying the European Convention on Human Rights to Extradition: Opening Pandora's Box?" [1990] 39 ICLQ 757; Richard B Lillich, "The *Soering* Case" 85 AJIL 128 (1991); Donald K Piragoff and Marcia VJ Kran, "The Impact of Human Rights Principles on Extradition from Canada and the United States: The Role of National Courts", 3 *Criminal Law Forum* 225 (1992); William A Schabas, "*Soering's* legacy: The Human Rights Committee and the Judicial Committee of the Privy Council take a Walk Down Death Row" [1994] 43 ICLQ 913; Harmen G van der Wilt, "*Apres Soering*: The Relationship between Extradition and Human Rights in the Legal Practice of Germany, The Netherlands and the United States" 42 NILR 53 (1995); and John Dugard and Christine Van den Wyngaert, *op cit*. These articles and the issues which they raise are not examined in detail here because our concern is with the relationship between international law (including human rights law) and criminal law rather than with human rights and extradition as such; and space is limited.

offence for which extradition is requested is punishable by death in the requesting state but not in the requested state, extradition may be refused “unless the requesting Party gives assurances satisfactory to the requested Party that the death penalty *will not be carried out*”²²⁷. It may be commented that, if the UK had chosen to insist on what it was entitled to in terms of the plain words of the treaty—namely an undertaking that the death penalty would not be carried out—the issue in the *Soering* case would never have arisen.

Meanwhile, an extradition request from Germany in which jurisdiction was based on the nationality principle was refused since the evidence in support, which was solely an admission to a German prosecutor made without a caution having been administered, did not satisfy the *prima facie* case requirement.

At the extradition hearing at Bow Street Magistrates’ Court the Government of the USA adduced evidence of the applicant’s guilt of murder, so as to satisfy the requirement of Article VII(3) of the extradition Treaty that there should be produced “such evidence as, according to the law of the requested Party, would justify...committal for trial”²²⁸. The Chief Metropolitan Magistrate committed the applicant for return. The applicant sought judicial review but that application failed because it was premature—the Secretary of State had not yet decided whether or not to order surrender and so there was no decision to review.

The applicant applied to EComHR on the basis, *inter alia*, that, notwithstanding the assurance given to the UK Government, there was a serious likelihood that he would be sentenced to death if extradited to the USA and that, having regard to the death row phenomenon, he would thereby be subjected to inhuman and degrading treatment and punishment contrary to Article 3 ECHR. EComHR held that there was no breach of Article 3 but referred the case to

²²⁶ HC Debs 10 March 1987, Col 955 (Mr David Mellor).

²²⁷ Emphasis added.

²²⁸ In other words, a *prima facie* case did exist but the evidence was in the hands of the USA, not of Germany. In light of the difficulties which were to follow for the UK, it seems legitimate to comment that the refusal of the German request, although inevitable given the content of UK law, was somewhat artificial. ECtHR was to comment that extradition to Germany would have avoided

ECtHR, as did Germany.

ECtHR considered that the issue was whether Article 3 could be applicable when the adverse consequences would be suffered outside the jurisdiction of the extraditing state as a result of treatment or punishment administered in the receiving state. It noted that Article 1 ECHR sets a territorial limit on the reach of the Convention and that the Convention neither governs the actions of States not party to it nor purports to be a means of requiring the Convention States to impose Convention standards on other States. The Court declined to read Article 1 as justifying a general principle to the effect that, notwithstanding its extradition obligations, a contracting state could not surrender an individual unless the conditions awaiting him in the country of destination are in full accord with each of the safeguards of the Convention. Nor did it think it could ignore the beneficial purpose of extradition in preventing fugitive offenders from evading justice in determining the scope of application of the Convention and of Article 3 in particular. It considered, however, that Article 3 enshrines one of the fundamental values of the democratic societies making up the Council of Europe and that it would not be compatible with the underlying values of the Convention if a Contracting State were knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed. In the Court's view, this inherent obligation not to extradite also extended to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by Article 3. Since it could not be said that the undertaking to inform the sentencing judge of the UK's position as regards the death penalty would eliminate the risk of that penalty being imposed, especially since the prosecutor proposed to seek that penalty, the likelihood of the feared exposure of the

the difficulty in relation to the possibility of the death sentence and the consequent "death row phenomenon" which formed the basis on which the case was decided.

applicant to the death row phenomenon²²⁹ was such as to bring Article 3 into play. The Secretary of State's decision to extradite the applicant to Virginia would, if implemented, give rise to a breach of Article 3.

There were several interests at stake in this and, because ECtHR only has jurisdiction to interpret and apply ECHR, it could not and did not take account of all of them.

The applicant himself had a right of individual petition to EComHR in respect of the breach of his Article 3 right. That was addressed.

Germany, as a party to ECHR, had an interest in the UK's compliance with that Convention.

The USA had an interest in the UK's compliance with the extradition treaty but no interest in ECHR.

The UK owed obligations to both Germany and the USA and its obligation to Germany was to secure the Article 3 right to Soering's enjoyment. These obligations conflicted. There is nothing in the extradition treaty with the USA which permits the UK to refuse extradition if the fugitive would be treated in the USA in a way which would breach ECHR. Nor is this unusual. The ILA Committee on Extradition and Human Rights has pointed out that "no treaty clearly confronts the difficult question of what a requested state is to do when faced with a conflict between an obligation contained in an extradition treaty and an obligation in a multilateral human rights convention"²³⁰.

In terms of general international law, the position of a State which finds that it has inconsistent treaty obligations is governed by Article 30 of the 1969 Vienna Convention. In general, that gives later treaties priority over earlier ones but where the parties to the later treaty do not include all the parties to the earlier

²²⁹ A condemned prisoner in Virginia could expect to spend 6 to 8 years on death row and the fact that most of that time would be a result of his taking advantage of all avenues of appeal did not alter the fact that he would have had to endure those conditions for many years and the anguish and mounting tension of living in the ever-present shadow of death. The applicant would have been (necessarily) subject to a severe regime. He was young and suffering from disturbed mental health.

one, the treaty to which both States are party takes precedence over that to which only one of them is a party²³¹. As between the UK and the USA, this would have meant that the extradition treaty should have taken precedence over ECHR. That rule, however, applies only as between those two states. The UK could not, by concluding a conflicting treaty with the USA, unilaterally avoid its obligation to Germany and its derived obligation to *Soering*. That, in effect, was the issue which underlay the case. The decision left unresolved the problem of the UK's obligation to the USA under the extradition treaty. In the event, that problem was solved by extraditing *Soering* to Virginia on lesser charges which did not carry the possibility of the death penalty²³². Had the USA not been accommodating in that respect, however, the issues which would have arisen would have included the legal effect of the UK's habit of accepting assurances which were less than those to which it was entitled as regards the death penalty and the effect of ICCPR, to which both the UK and the USA are Parties. That entered into force in 1976, after the UK/US extradition treaty but before the *Soering* affair. It contains at Article 7 wording which is identical to that of Article 3 ECHR. There must be a case for saying that the provisions of ICCPR should have prevailed over the those of the extradition treaty. Certainly, the USA was sufficiently concerned about the effect of the decision in *Soering* to make reservations to both the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment 1984 and ICCPR so as to exclude the death row phenomenon from the interpretation of the phrase "cruel, inhuman or degrading treatment or punishment"²³³.

Soering was concerned with Article 3 ECHR. Harris and others point out

²³⁰ International Law Association, Tapei Conference (1998), Committee on Extradition and Human Rights, Third Report, 3.

²³¹ Art 30(4).

²³² See Susan Marks, "Yes, Virginia, Extradition May Breach the European Convention on Human Rights" [1990] CLJ 194.

²³³ *Soering* was applied but distinguished on the facts by the UN Human Rights Committee in *Kindler v Canada* 470/1991 (1993). In *Ng v Canada* 469/1991 (1994) the Committee held that extradition to the USA where the fugitive faced the possibility of death by cyanide gas asphyxiation (which might cause agony for up to 10 minutes) would violate Article 7 ICCPR.

that other cases might fall within Article 8²³⁴ and EComHR was prepared to consider such an argument in *X v Switzerland*²³⁵, though in that case the necessary threshold was not reached. In *Bulus v Sweden*²³⁶ EComHR held that to separate a teenage boy from most of his family by deporting him would breach Article 8. One might imagine extreme circumstances in which Article 8 issues would arise in an extradition context.

Van den Wyngaert has argued, on the basis of *Soering*, that, whilst it cannot be said that the Strasbourg organs accept the inherent priority of obligations under ECHR over other treaty obligations, the mere fact of applying the Convention to extradition seems to indicate a view that in the case of a conflict ECHR should prevail. At least, she maintains, the Strasbourg organs, without expressly addressing the issue of the ranking of treaties in priority, accept that certain human rights can be independent obstacles to extradition²³⁷. That having been said, in *Chinoy*²³⁸ EComHR took account of the UK's obligation to the USA in terms of the extradition treaty in finding that the detention of an alleged drug trafficker with a view to his extradition to the USA did not breach Article 8 ECHR. Evidently, just as ECHR must be taken into account in understanding what a State can do in relation to extradition, so relevant extradition treaties must be taken into account in determining the application of ECHR to a given case. What does seem clear is that, since *Soering*, one has to accept that, even where there is an unambiguous treaty provision such as the obligation to extradite constituted by Article I of the UK/USA extradition Treaty, the relationship between international law and criminal law will be tripartite, involving international extradition law, municipal extradition law and international human rights law, at least to the extent that it is opposable to the

²³⁴ *Op cit*, 73.

²³⁵ 24 DR 205 (1981).

²³⁶ 35 DR 57 (1984).

²³⁷ Christine Van den Wyngaert, "Applying the European Convention on Human Rights to Extradition: Opening Pandora's Box" (1990) 39 ICLQ 757, 763-4.

²³⁸ *Supra*.

requested State and has some effective enforcement mechanism²³⁹.

The European Convention on Extradition

Introduction

In practical terms, ECE is the most important international extradition arrangement to which the UK is party, not only because it is the vehicle for a significant proportion of extradition requests but also because it provides the foundation for European extradition law. It has special significance for Scots law because it was accession to ECE which provided the context for the creation, in the 1989 Act, of a Scottish extradition jurisdiction. As we shall see below²⁴⁰, efforts are being made within the context of the EU to "streamline" extradition and the UK has been one of the states pressing for such development. We shall consider the development of the Convention and of the UK's attitudes to it. Thereafter, we shall examine the basis on which the UK acceded.

The development of the Convention

The history of ECE is set out conveniently in the Introduction to the Explanatory Report provided by the Council of Europe²⁴¹. Following an initiative by the Consultative Assembly and a Recommendation²⁴² a committee of Government experts was established to establish extradition principles acceptable to all Member States and whether these should be implemented by a multilateral convention or left to serve as a basis for bilateral treaties. Considerable agreement was reached about the principles which should govern extradition and a new Recommendation was adopted in 1954²⁴³ urging that the work should continue "even if it were to appear subsequently that certain Member States find themselves unable to become parties to such a convention". It is Council of

²³⁹So the extradition legislation in Switzerland, Austria and Germany has adopted the principle that extradition is to be refused if procedure in the requesting State is contrary to ECHR Van den Wyngaert, *op cit*, 759. In Ireland and the Netherlands the Courts have developed a similar approach (Bert Swart, "Extradition"; Hilary Delaney and Gerard Hogan, "Anglo Irish Extradition Viewed from an Irish Perspective" 1993 PL 93, 108).

²⁴⁰ Page 92.

²⁴¹ *Explanatory Report on the European Convention on extradition*, Council of Europe, 1985, 5-7.

²⁴² R (51) 16, *On the preparatory measures to be taken to achieve the conclusion of a European Convention on Extradition*.

²⁴³ R (54) 66.

Europe practice not to make *travaux préparatoires* available (providing explanatory memoranda in their place)²⁴⁴ and so we cannot know what prompted this. We can, however, guess that the UK was in this the Member State uppermost in the minds of the Assembly. There is available at the Public Record Office in London the draft brief for the UK representative for the October 1953 meeting to consider principles acceptable to all Member States²⁴⁵ which gives a clear indication of the approach which was to be taken by the UK delegate in relation to the issues to be discussed at the meeting. It was not constructive.

The introduction to the draft brief, having offered the opinion that "[i]t seems unlikely that...general agreement will be reached on many principles", concluded with the remark that "[w]e have no desire to hasten the work on this subject and it would be an advantage if this meeting did no more than undertake some preliminary discussion and determine what principles should be further examined". It is difficult to interpret this as anything other than an elegantly framed instruction to be obstructive. Since in fact a considerable measure of agreement was reached it appears that the UK misread the situation quite seriously.

Although nowhere stated explicitly, there seems to have been a fear underlying the brief that the whole exercise would result in continental approaches to extradition being imposed on the UK. The most obvious example of this relates to the question of the non-extradition of nationals, a principle entrenched in the constitutions of certain countries (such as Germany²⁴⁶). The UK

²⁴⁴ H-J Bartsch, "The Implementation of Treaties Concluded within the Council of Europe", in FG Jacobs and S Roberts (eds), *The Effect of Treaties in Domestic Law*, Sweet & Maxwell, 1987, 207. It is argued in Sir Ian Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd edn, Manchester University Press, 1984, 129 that such explanatory reports form part of the context of the treaty for interpretation purposes, falling within the reference in Article 31(2) of the 1969 Vienna Convention on the Law of Treaties to "any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty".

²⁴⁵ FO 371/108050, WU 1591/10.

²⁴⁶ See the declarations and reservations set out in Schedule 3 to the European Convention on Extradition Order 1990 (SI 1990 No 1507).

delegate²⁴⁷ was instructed to maintain the strong preference of the UK for the principle of surrender of nationals. He was instructed that the *aut dedere aut judicare* principle (now found in many multilateral instruments²⁴⁸) could not be accepted as compensation for refusal to surrender nationals and was instructed to advance in support of that position arguments which related entirely to the inability of English criminal procedure to deal with the extraterritorial criminal jurisdiction which such an approach necessitates and which failed completely to recognise either that other countries approach jurisdiction in a different way²⁴⁹ or that change in English criminal procedure might be considered. It should be said that there is no reason to suppose that Scots law would have been any better equipped to deal with bases of jurisdiction other than the territorial one but there is no evidence in the draft brief that the Scottish position was considered.

The inescapable conclusion from the draft brief and the related material is that the UK had a deep antipathy to the whole idea of a multilateral convention and had no intention of allowing its extradition practice to be modified so as to reflect any treaty which did not itself conform to the parameters set by the 1870 Act. The UK did not at that time sign ECE.

The UK attitude to the Convention between negotiation and 1990
The UK's lack of enthusiasm for ECE at the stage of negotiation persisted. The Report of the 1974 Working Party noted that UK accession to the EEC (as it then was) and the increasing amount of traffic between the UK and "Europe" which was likely to result prompted the question whether extradition between the UK

²⁴⁷ He was Mr FLT Graham-Harrison, Assistant Secretary at the Home Office (Public Records Office, Foreign Office Doc 371/108050 1591/13A, Report of the Committee of Experts on Extradition, CM (53) 129, 15).

²⁴⁸ See the discussion in M Cherif Bassiouni and Edward M Wise, *op cit*, especially 7-19.

²⁴⁹ For a summary of the different bases of jurisdiction used by Council of Europe member States, see European Committee on Crime Problems, *Extraterritorial criminal jurisdiction*, Council of Europe 1990. See also PJ Slot and E Grabandt, "Extraterritoriality and Jurisdiction" (1986) 23 CMLR 545. Some things do not change. On 24 March 1999, Kate Hoey, Under-Secretary of State at the Home Office, who manifested no understanding whatever of the issues involved in the bases of jurisdiction, said in public that the refusal of civilian jurisdictions to extradite their own nationals was "eminently unreasonable" (House of Lords Select Committee on the European Communities, *Prosecuting Fraud on the Communities' Finances-the Corpus Juris*, HL Paper 62, 1999, 106). See the writer's attempt at damage limitation (*ibid*).

and its European partners might not be more effectively secured if the UK became a party to ECE. The Working Party went on to say that the UK "took an active part in the drawing up of the Convention, and delegates of other states tried to help us find a way round the problems which it presented to us"²⁵⁰. Nevertheless, they said that "[t]he main obstacle to accession to the Convention has always been that it does not follow our firmly established rule that before a person may be extradited to a foreign country, a *prima facie* case must be made out against him to the satisfaction of a court"²⁵¹. Their conclusion, after examination of several aspects of ECE, was that accession would have to be accompanied by a reservation preserving the UK's right to insist on a *prima facie* case. They took the view that a decision by the UK to become a party would be favourably received by other parties even with such a reservation²⁵². Yet they stopped short of recommending accession, perhaps because their terms of reference focused on amending and updating the 1870 Act.

It is suggested that the stress which the Working Party laid on the *prima facie* case requirement was misplaced and that their argument does not support their conclusion. If, as the Working Party recognised and as Israel proved, a reservation preserving the right to insist on a *prima facie* case was possible it must follow that the fact that ECE did not incorporate such a test cannot have been the "main" obstacle to accession. There must have been some deeper objection. Similarly, the Working Party's assertion that the need to study the reservations made by other parties and make supplementary agreements with many of them would render illusory the saving of work in negotiating new treaties with states which were party to ECE²⁵³ does not stand up to examination. It is less onerous to

²⁵⁰ *Op cit* 110. This analysis of the UK part in negotiations seems to involve some reinterpretation of history.

²⁵¹ *Op cit* 113. This was softened, in the 1982 Working Party's Report, to "the difficulty of reconciling our own criminal law and procedures with those of Continental countries" (para 16.5). The *prima facie* case requirement is not dealt with in the draft brief, apparently because it was not an issue raised in the memorandum by the Council of Europe Secretary General which prompted that brief.

²⁵² *Op cit* 116.

²⁵³ *Ibid.*

negotiate a supplementary treaty dealing with one or two aspects of extradition than to negotiate a treaty dealing with all aspects of the subject, and in fact, such supplementary agreements have not been necessary since accession in February 1991. It is suggested that a better explanation for the UK attitude is a UK preference at that time for bilateral treaties, combined with a continuing suspicion of all things continental and legal, rather than any difficulty with any particular provision of ECE. In a minute on the subject from the responsible Foreign Office official in July 1953 it is recorded that "the Home Office were reluctant to have the suggestion pursued at all. Sir Eric Becket, however,...persuaded the Home Office to agree that HMG, *while opposing any drafting of a multilateral Convention*, should join in any study of extradition questions by experts"²⁵⁴.

We should, then, read the draft brief and also the report of the 1974 Working Party against the background that the UK had in 1953 had objections to the very principle of a multilateral Convention and not merely to particular provisions in ECE. Nevertheless, arguments were advanced about particular provisions and must be presumed to have been seriously intended, even if they were not in fact the underlying reason for the UK's delay of over 30 years in signing the Convention. Those arguments related to English law pre-occupations. In the draft brief they related to the taking of extraterritorial jurisdiction in order to deal with non extradition of nationals and in the Working Party report they related to the *prima facie* case. The subject of this thesis is the relationship between the criminal law of *Scotland* and international law. We must ask, then, how far those pre-occupations reflected Scots law.

The difficulties in relation to extraterritorial jurisdiction probably did apply to Scots law as much as they did to English (though there is no evidence of that being considered). Although Scots law, with its emphasis on the place of conduct²⁵⁵, can probably in practice deal with a wider range of offences than can

²⁵⁴ Public Records Office, FO Doc 371/108050 WU 1591/6, minute from Mr Bushe-Fox, 21 July 1953 (emphasis added).

²⁵⁵ *Laird v HM Advocate* 1984 SCCR 469.

English law with its emphasis on the place of the final element of the offence²⁵⁶, both are firmly territorial in their approach. Such extraterritorial criminal jurisdiction as exists in Scots law is somewhat exceptional²⁵⁷. Since, however, the arguments based on the jurisdictional difficulty missed the point entirely in relation to *aut dedere aut judicare* and since the law in relation to jurisdiction did not have to be changed in either Scotland or England in order to accede to ECE it would seem that such limitations as exist in Scottish criminal jurisdiction were not of actual significance in relation to that accession²⁵⁸.

The pre-occupation with the *prima facie* case requirement did not reflect Scots law at all. The 1982 Working Party recognised²⁵⁹ that Scottish domestic practice is "akin to that of other European countries". To the (somewhat questionable) extent that the absence of the *prima facie* case requirement from ECE did indeed represent a "main" obstacle to accession, it follows that Scots law was denied the benefits which earlier accession might have brought simply because English law had a problem. There appears to have been no occasion on which the UK has refrained from participation in a treaty which was congenial to English law but where Scots law had a problem. On the contrary; the UK ratified the Laundering Convention before Scotland had any confiscation mechanism for crime other than drug trafficking and terrorism and before there was any immediate prospect of such a mechanism being provided. That was dealt with by a reservation excluding Scotland from the relevant Article. There is no reason in principle why the UK could not have acceded to ECE with a reservation like Israel's insisting on the *prima facie* case requirement except where the fugitive is found in Scotland. In practice, of course, an admission by the UK that what was

²⁵⁶ See Colin Warbrick and GR Sullivan, "Territorial Jurisdiction: Criminal Justice Act 1993", [1994] 43 ICLQ 460; GR Sullivan and Colin Warbrick, "Territoriality, Theft and *Atakpu*" [1994] Crim LR 650; Geoff Gilbert, "Who has Jurisdiction for Cross-Frontier Financial Crimes" [1995] 2 *Web Journal of Current Legal Issues* 76; Matthew Goode, "Two New Decisions on Criminal 'Jurisdiction': The Appalling Durability of Common Law" 20 *Criminal Law Journal* 267 (1996).

²⁵⁷ GH Gordon, *Renton and Brown's Criminal Procedure*, 6th edition, W Green, 1996, 10.

²⁵⁸ It would seem from section 2(1)(b), (2) and (3) of the 1989 Act that the UK now fully acknowledges the validity (or at least the existence in practice) of the active personality principle.

²⁵⁹ Para 4.3.

trumpeted as a fundamental right of all British citizens was no such thing might have led to some hard questions²⁶⁰.

Reconsideration of this position was forced in 1978 when Spain denounced its extradition treaty with the UK as a result of the difficulties it experienced over the *prima facie* case requirement²⁶¹. The Interdepartmental Working Party on Extradition, which had originally reported in 1974, was reconvened in 1982 and their Report noted that developments in the nature of international crime and in the measures taken by states to deal with it demanded a complete re-examination of the subject. The growth of transnational crime associated with increased freedom of movement within Europe was in particular regarded as a development which required attention²⁶². It dawned gradually upon the UK that the difficulties arising from the differences between the English common law system and the civilian system "may have meant in some cases that criminals have escaped justice"²⁶³.

This view became firmer as the 1980s progressed (and was to affect the UK attitude to other forms of mutual assistance too), until in Lords Committee on Part I of the Bill which became the Criminal Justice Act 1988, the Earl of Caithness was to say that the fact that the UK was not party to ECE had become "a major stumbling block in our negotiations throughout Western Europe to get a more comprehensive agreement on crime where people who are committing crimes can easily hop from one country to another"²⁶⁴. A little later in the same

²⁶⁰One response of the Crown Office to the incorporation of ECHR has been to recognise that Full Committal on Petition requires that the prosecutor should have a *prima facie* case and to provide a statement of that case; but it has stopped short of disclosing the identities of witnesses or statements in the way traditionally required by English law.

²⁶¹*Extradition*, Cmnd 9421, 1985, 5. Leigh has noted that Spain was prepared to negotiate a replacement treaty with the UK which contained a *prima facie* case requirement (I Leigh, *Criminal Justice Act 1988*, Current Law Statutes Annotated 1988, 33-27) but Gilbert points out (*Aspects of Extradition Law*, 56) that the evidentiary test was less stringent. It may also be noted that history has a way of repeating itself. In 1865, France terminated its extradition treaty with the UK on the ground that the *prima facie* case requirement insisted on by the UK was an insuperable obstacle to extradition. By doing so, France prompted the overhaul of the law which resulted in the 1870 Act.

²⁶²1982 Working Party para 1.9.

²⁶³*Ibid*, para 1.11.

²⁶⁴HL Debs Vol 489 (No 1369) Col 22 (20 October 1987).

debate, he said that the clear implication of the decisions of certain countries not to even try to obtain extradition from the UK is that serious offenders were known to be in the UK but no attempt was being made to extradite them²⁶⁵. Evidently it had finally been realised by the Government that it was denying itself the opportunity which extradition requests present to be rid of foreign criminals. There seems also to have been a realisation that the UK's own approach to extradition was inconsistent with the Government's developing general international criminal law policy, which was that "international crimes can only be dealt with in an international framework"²⁶⁶ and that what was needed was "practical means of co-operation which will prevent criminals from using jurisdictional barriers to evade justice"²⁶⁷. In short, the Government now wished to emphasise the co-operative aspect of extradition law.

The 1982 Working Party saw its task as being to determine how, "whilst preserving as far as possible our own legal traditions, we can bring extradition law in the United Kingdom up to date and into line with modern developments elsewhere in the world and, in particular, in Europe". We may note the emphasis on the preservation of existing legal traditions-the Working Party was not starting from scratch-but also the importance which was being attached to making the law work in a European context, where there was, of course, continually increasing freedom of movement both in fact²⁶⁸ and in law²⁶⁹.

The question of accession to ECE was regarded by the 1982 Working Party as being outwith its remit²⁷⁰. Nevertheless, it made substantial reference to

²⁶⁵ *Ibid*, col 44.

²⁶⁶ Sir Michael Havers, "Legal Co-operation: A Matter of Necessity" 21 *International Lawyer* 185 (1987).

²⁶⁷ *Ibid*, 193.

²⁶⁸ It has been pointed out that "passenger volume on international flights is estimated to have risen from 26 billion passenger miles in 1960 to between 600 and 700 billion by 1992" (WC Gilmore, *Dirty Money*, Council of Europe Press, 1995, 13).

²⁶⁹ Within the EC, the Treaty of Rome sought to achieve free movement of workers by 1969 (see CH Church and D Phinnemore *European Union and European Community*, Harvester Wheatsheaf, 1994, 108). As to the possible effects of that on extradition practice, see Mark Furse and Susan Nash, "Free Movement, Criminal Law and Fundamental Rights in the European Community" 1997 JR 148.

²⁷⁰ *Ibid*, para 16.9.

ECE as being the basis of the extradition arrangements between most European states, and did express the view that such accession would in practice carry with it several advantages, especially if the *prima facie* case requirement was discarded (a matter on which the Working Party was unable to reach agreement)²⁷¹.

The 1982 report resulted in the 1985 Green Paper, *Extradition*, which accepted much of the 1982 Working Party's reasoning, recognised that about a third of all extradition requests received by the UK failed as a result of the *prima facie* case requirement and also recognised that foreign states were being deterred from making requests as a result²⁷².

After the 1985 consultation and a 1986 White Paper²⁷³, and having regard to serious concerns about terrorism, drug trafficking and international fraud²⁷⁴, extradition provisions were included in Part I of the Criminal Justice Act 1988. That was pre-consolidation legislation, and did not itself ever govern extradition in practice. The 1988 Act provisions, together with some of the provisions of the 1870 Act and of the Fugitive Offenders Act 1967 (which governed rendition within the Commonwealth) were consolidated in the 1989 Act. The primary purpose of the exercise was to place the UK in a position to become party to ECE and one element was power to "dispense selectively with the *prima facie* case requirement"²⁷⁵. The opportunity was also taken to create a quite extensive, though not unlimited, Scottish extradition jurisdiction. The UK signed ECE in December 1990. Accession took place on 13 February 1991, and ECE came into force as regards the UK on 14 May 1991²⁷⁶. It was incorporated into UK law by the European Convention on Extradition Order 1990²⁷⁷. The Additional Protocol (which deals with aspects of the political offence exception and cases in which

²⁷¹ *Loc cit.*

²⁷² *Ibid* 4.

²⁷³ *Criminal Justice: Plans for Legislation*, Cmnd 9658, 1986.

²⁷⁴ Havers, *op cit.*

²⁷⁵ The Secretary of State for the Home Department (Mr Douglas Hurd) HC Debs Vol 125, Col 682 (18 January 1988). Minutes later, and in the same column, Mr Alex Carlisle MP was to repeat the fallacy that "no British subject...can be committed for trial by a court in this country unless the prosecution has established a *prima facie* case against him".

²⁷⁶ *Ibid.*

final judgement has been rendered in a third state) was not signed. The Second Additional Protocol (which deals with accessory extradition for offences which carry only pecuniary sanctions, fiscal offences, judgements in absentia, amnesties and the form of the request) was signed but not acceded to. The UK was to explain its position in relation to the two Protocols by saying that both contain a mixture of provisions, some of which could but some of which could not be adopted immediately. By way of example, it was explained that accessory extradition, in the Second Additional Protocol, caused problems because there is no power in UK law to extradite for offences punishable with only a pecuniary sanction²⁷⁸. This, of course, begs the question. The UK had just passed extradition legislation and could in that have legislated so as to be able to accede to the Additional Protocols. What the UK meant was that it had chosen not to do so. It is clear from the reservations and declarations made by all States Party to ECE²⁷⁹ that municipal law plays a significant part in what states are prepared to do in relation to extradition. Indeed, that is clear from the text of the Convention itself. So, for example, Article 6 ECE gives Parties a right to refuse to extradite their own nationals and many states from the civilian tradition have made it clear by declaration that they have provisions in their national laws which compel them to invoke that right.

Accession with reservations

What the UK did in the 1989 Act was to legislate in terms which were compatible with ECE but which did not directly apply ECE. On accession, reservations were made, some of which were explained as being conditioned by the Act. Thereafter, ECE was incorporated by Order in Council. Given the UK's somewhat unconstructive attitude to the negotiation of ECE, there is little to be gained by a detailed analysis of ECE's provisions in light of the 1870 Act (which governed

²⁷⁷ SI 1990 No 1507.

²⁷⁸ European Committee on Crime Problems; Committee of Experts on the Operation of European Conventions in the Penal Field (PC-OC), 21st Meeting, 23-26 April 1991, Secretariat Memorandum (hereafter, "PC-OC Memorandum"), para 8.

²⁷⁹ These are all set out in convenient form in the European Convention on Extradition Order 1990 (SI 1990 No 1507) Schedule 3.

UK extradition law when ECE was negotiated). The UK was not, at the time of negotiation of ECE, prepared to become a Party. The very idea of a multilateral treaty was unacceptable. So was the use of the eliminative method of defining extradition crime²⁸⁰ and the possibility for States to refuse to extradite their own nationals²⁸¹. The draft brief for the UK representative at the negotiation of ECE instructed that he should “refuse to accept the proposition that the principle of non-surrender, if other countries insist on it, should be compensated by an obligation on the country concerned to prosecute”. In support of this, he was to argue that since the English system of prosecution required the personal attendance of witnesses and since there was no means of compelling the attendance of witnesses from overseas, there would in most cases be no means of trying the accused²⁸²; that such limited extraterritorial jurisdiction as is possessed by the UK courts could not practicably be extended; and that “we cannot be expected to make wholesale inroads upon our traditional conceptions of the powers of the courts, or of the rules that should govern the admissibility of evidence in a criminal trial”²⁸³. It is perfectly clear from this that the UK did not, at that time, regard a pan-European extradition regime as sufficiently important to contemplate changes in existing practice. Only after the process of re-examination described above²⁸⁴ did that position alter.

When in the mid 1980s the UK came to consider amending its extradition law and acceding to ECE, it no longer had the opportunity to contribute to what was written on a blank page. Rather, it had to accept what was written, subject to a limited right to make reservations. In the reservations, by which the UK was to some extent able to “personalise” the Convention, we can find material which will help us to understand the interaction sought to be achieved between the Convention and UK municipal law. They are annexed to the European

²⁸⁰ Article 2 ECE.

²⁸¹ Article 6.

²⁸² Compare the significance of this in the development of mutual legal assistance law-see 147 below.

²⁸³ *Op cit.*

²⁸⁴ Page 77.

"numerous and difficult...in practice", the UK answered as though the English law requirements would apply throughout the UK and failed to explain that a different standard might apply in Scotland²⁸⁷.

Article 1 ECE contains the basic obligation to surrender "all persons against whom the competent authorities of the requesting party are proceeding for an offence or who are wanted by the said authorities for the carrying out of a sentence". The UK has reserved the right not to extradite persons convicted in absence. Neither Scots nor English law permits such conviction in relation to any imprisonable (and hence potentially extraditable) offence. An alternative approach would have been to ratify the Second Additional Protocol, Article 3 of which provides for certain protections in the case of conviction in absence.

The origins of this provision in the Second Additional Protocol lie in the Dutch reservation to Article 1 ECE, to the effect that extradition would not be granted if the accused had not been able to exercise the rights provided for in Article 6(3)(c) ECHR²⁸⁸. Certainly, ECtHR in *Soering* did contemplate that an unfair trial in the requesting state, in breach of Article 6 ECHR, might give rise to liability on the part of the requested state. Accordingly, although the UK's objection to extraditing in cases of conviction in absence does reflect municipal law, it also reflects a wider concern about such convictions and (whether consciously or not we do not know) the possibility that such extraditions might on occasion breach international human rights law.

Article 2 defines the offences which are extraditable. They are those "punishable under the laws of the requesting Party and of the requested Party by deprivation of liberty or under a detention order for a maximum period of at least one year or by a more severe penalty". The UK reservation provides that it "may decide to grant extradition in respect of any offences which under the law of the requesting state and the law of the United Kingdom are punishable by a sentence of imprisonment for a term of 12 months or any greater sentence, whether or not

²⁸⁷ PC-OC Memorandum para 18.

such a sentence has in fact been imposed". A further reservation permits the UK to refuse extradition "if it appears, in relation to the offence or each of the offences in respect of which...return is sought that, by reason of its trivial nature or because the accusation is not made in good faith in the interests of justice, it would in all the circumstances be unjust or oppressive to return him".

The UK explained to PC-OC that both of these reservations are designed to reflect the terminology of the UK legislation²⁸⁹. The "trivial offence" reservation repeats, almost verbatim, section 11(3)(a) and (c) of the 1989 Act. That section is derived from the Fugitive Offenders Act 1967 section 8(3), which itself was a response to paragraph 9(3) of the Commonwealth Rendition Scheme and derived from the Fugitive Offenders Act 1881 section 10 (but is not traceable to the 1870 Act). In a Commonwealth setting, the provision makes sense, because both the Imperial legislation and the Scheme which succeeded it proceeded (until the Scheme was revised) by the enumerative method. The eliminative method is intrinsically more apt to weed out trivial offences, especially in the legal systems of civilian states where the sentences available for particular offences fall generally within tighter bands than those in any of the UK systems²⁹⁰. The breadth of the sentencing bands available in the UK (and perhaps especially in Scotland) might well have meant that some sort of reservation in respect of trivial offences would have been required anyway; but the particular reservation made represents the application to late 20th century Europe of law developed to deal with rendition within the 19th century British Empire. That was not explained to PC-OC, though the UK did hasten to assure it that it was thought unlikely that the safeguard for accusations not made in good faith in the interests of justice would be relevant in the context of requests made by parties to ECE²⁹¹.

It was explained to PC-OC that the reservation about the definition of

²⁸⁸ Essentially, to defend himself in person. See Council of Europe, *Explanatory Report on the Second Additional Protocol to the European Convention on Extradition*, para 24.

²⁸⁹ PC-OC Memorandum, para 10 and 11.

²⁹⁰ See 1974 Working Party Report, 23 para 41c.

²⁹¹ PC-OC Memorandum para 11.

extraditable offences reflects the terminology of the 1989 Act and it was said that the Act was framed so as to enable the UK to accept the ECE definition²⁹². The obvious question is why the 1989 Act definition was so different from the ECE definition as to require clarification by reservation. Indeed PC-OC had some concern that the reservation amounted to a derogation²⁹³. What the UK might have explained, but did not, was that the definition of extradition crime in the 1989 Act is intended to satisfy all those extradition arrangements which are within Part III of the Act and not only ECE. The Commonwealth Rendition Scheme is the other obvious example.

The UK has made no reservations to Article 6, which deals with extradition of nationals. It will be recalled that the non-extradition of nationals and its corollary, *aut dedere aut judicare*, (now to be found in Article 6(2)) were issues which provoked particular opposition from the UK during the negotiation of ECE. That the UK has been prepared to accept Article 6 without reservation demonstrates how significantly its priorities have been modified by the passage of time; though two further points will demonstrate that the UK has not undergone any kind of conversion on the issue and that its position is pragmatic. The first is that it is difficult to see what reservation could have been made which would have had any practical effect. And the second is that, in the context of negotiations about extradition within the context of the EU, the possibility of extraditing nationals is not only on the agenda²⁹⁴ but now finds expression in Article 7 of the as yet not-in-force Convention relating to Extradition between the member States of the European Union²⁹⁵. The writer holds a copy of an unpublished Paper presented by the UK to the European Council (Justice and Home Affairs), dated 1 November 1993 and commenting on the statement on extradition made by the

²⁹² *Ibid.*

²⁹³ *Ibid.*

²⁹⁴ G Vermeulen and T Vander Beken, "Extradition in the European Union: State of the Art and Perspectives" 3 *European Journal of Crime, Criminal Law and Criminal Justice* 200, 220 (1996); and, by the same authors, "New Conventions on Extradition in the European Union: Analysis and Evaluation" 15 *Dickinson Journal of International Law* 265, 294 (1997).

²⁹⁵ OJ 96/C 313 02; and see the Explanatory Report on that Convention (OJ 97/C 191/03)

Ministers of Justice at Limlette on 28 September 1993. That Paper notes that the UK had proposed in July 1992 that the Twelve should agree, as between themselves, to remove restrictions on extradition of own nationals. More recently, a paper submitted by the UK to the K4 Committee of the European Union in March 1999 urged that “we should aim in the longer run for the complete abolition within the EU of...restrictions on extradition of own nationals”²⁹⁶.

Article 9 deals with *non bis in idem*. It provides that extradition “shall not be granted if final judgement has been passed by the authorities of the requested Party upon the person claimed in respect of the offence or offences for which extradition is requested. Extradition may be refused if the competent authorities of the requested Party have decided either not to institute or to terminate proceedings in respect of the same offence or offences”. The UK reservation effectively rewrites this so that it will apply municipal law. It “reserves the right to refuse to grant extradition of a person accused of an offence, if it appears that that person would if charged with that offence in the United Kingdom be entitled to be discharged under any rule of law relating to previous acquittal or conviction”. This is straightforward but it is worth putting down the marker at this point that the UK has made a reservation to ECMA dealing with the same issue in a different and less satisfactory way. That is discussed below²⁹⁷.

Extradition and the Third Pillar of the EU

Introduction

Two extradition conventions have been concluded within the context of the Third Pillar of the European Union. Although they are not yet in force, the UK has signed them and is thus both qualified to proceed to ratification and, more to the point, subject to “an obligation in good faith to refrain from acts calculated to frustrate the objects of the treat[ies]”²⁹⁸ and they offer some insight into the kind of development to which the UK is prepared to become party. They can be

²⁹⁶ Home Office, “Mutual Recognition of Judicial Decisions and Judgements in Criminal Matters”, 1999, para 25.

²⁹⁷ Page 159.

²⁹⁸ Ian Brownlie, *Principles of Public International Law*, 5th edition, Clarendon Press, 1998, 611.

considered quite briefly; but they offer the opportunity to describe the Third Pillar arrangements in general as they impinge on criminal law. There is reason to think that the Third Pillar will be of considerable significance for European (and hence Scots) international criminal law in the next few years²⁹⁹.

The Third Pillar described

The first sentence of the preamble to the Treaty Establishing the European Community 1957 states the determination of the Contracting Parties to "lay the foundation of an ever closer union among the peoples of Europe". The working out of that and associated objectives has resulted in the creation (in some respects, "evolution" might be a better word) of "a unique form of legal and political organisation"³⁰⁰. This has involved, most fundamentally, substantial economic integration and that has entailed the taking of a multitude of steps to make intra-Community trade easier. These have included the substantial relaxation of border controls. One effect of this has been to make life easier for transnational criminals. Organised crime is a business³⁰¹ and therefore benefits from anything which makes business easier. Accordingly, such crime represents a particular problem for the EU³⁰² and it is necessary to address it at EU level. The Action Plan to Combat Organized Crime adopted by the Council of the EU in 1997³⁰³ asserts that "crime is increasingly organizing itself across national borders, also taking advantage of the free movement of goods, capital, services and persons...if Europe is to develop into an area of freedom, security and justice, it needs to organize itself better, and to provide strategic and tactical responses to the challenges facing it. This requires a political commitment at the highest level"³⁰⁴.

²⁹⁹ See 317 below.

³⁰⁰ Dominic McGoldrick, *International Relations Law of the European Union*, Longman, 1997, 1.

³⁰¹ United Nations Economic and Social Council, "Problems and Dangers Posed by Organized Transnational Crime in the Various Regions of the World" (Background document for World Ministerial Conference on Organized Transnational Crime, Naples, 21-23 November 1994), UN Doc E/CONF.88/2, para 9.

³⁰² See, amongst many others, Martin Brown, "The Single Market After 1992-Free Movement for Criminals?" in William C Gilmore (ed) *Action Against Transnational Criminality*, Commonwealth Secretariat, 1992, 80; and Petrus van Duyne, "Implications of cross-border crime risks in an open Europe" 1993 *Crime, Law and Social Change* 99.

³⁰³ OJ 97/C 251/01.

³⁰⁴ *Op cit*, para 1.

Such efforts, however, bring into tension the desire of the Member States to co-operate effectively against crime and their reluctance to relinquish control over criminal evidence and procedure, which is traditionally seen as linked closely to national sovereignty³⁰⁵. It could not be said at present that the relationship between criminal law and EU law (especially EC law) has really stabilised. What can be said, however, is that EU law already has a significant effect on some aspects of criminal law and has the potential to have a very significant effect over a wide range of criminal law subject areas.

The Treaty on European Union 1992 (the Maastricht Treaty-"TEU") established the European Union with a "pillared" structure. The central, or "First" Pillar consists of the 3 European Communities. The Second Pillar is the Common Foreign and Security Policy; and the Third Pillar is Justice and Home Affairs³⁰⁶.

The First Pillar is characterised by the full involvement of the Community institutions. The Second Pillar is intergovernmental, with a role for the Commission which is not insignificant but which is weaker than its role under the First Pillar³⁰⁷. However, although the Second Pillar arrangements apply in principle to all areas of foreign policy³⁰⁸, relatively little progress has been made within the field³⁰⁹ and such progress as there has been has not related to criminal law matters. The Third Pillar is intergovernmental, with rather restricted roles for the European Court of Justice ("the ECJ") and the Commission. We shall address the First Pillar below, in the context of proceeds of crime, and the Third Pillar here. The Second Pillar is not relevant to our purpose and will not, therefore, be considered.

Conventions under the Third Pillar are international instruments properly

³⁰⁵ See, for example, Mark Furse and Susan Nash, *op cit*.

³⁰⁶ See David AO Edward and Robert Lane, *European Community Law: An Introduction*, 2nd edition, Butterworths, 1995, 14; Paul Beaumont and Gordon Moir, *European Communities (Amendment) Act 1993 with the Treaty of Rome (as amended)*, Sweet & Maxwell, 1994, 32-4.

³⁰⁷ McGoldrick, *op cit*, 141.

³⁰⁸ *Ibid*.

³⁰⁹ Xavier Denoel, "The United Kingdom In or Out? The British Approach to the 1996 Intergovernmental Conference" (1996) 2 *European Public Law* 543, 555.

so called³¹⁰. Their relationship with UK municipal law should be exactly the same as that of any other kind of treaty, though the fact that, at the time of writing, only one Third Pillar convention is yet in force precludes confirmation of that by reference to actual practice³¹¹.

The history of co-operation between EC, and now EU, member States in justice and home affairs matters is not simple. Indeed Walker has described it as "a historical record which is marked by discontinuity and institutional complexity, full justice to which would require detailed analysis"³¹². Fortunately, such detailed analysis is not required here. Instead, we sketch out the development of the Third Pillar but do so primarily to make the related points that, since Third Pillar conventions are international law proper with all that means as regards the degree of control a state can exercise over the obligations which it accepts, the UK has preferred the Third Pillar over the First and that there is reason to believe that Third Pillar instruments might well come to assume very considerable significance in the relationship between international law and criminal law.

The EC treaty did not address justice and home affairs matters. Nor would the UK have been willing to accept the discussion of such matters within the formal EC structure. When an attempt was made by the Commission to specify the use of the criminal law in the context of the Money Laundering Directive it was the UK that took the lead in suggesting a somewhat artificial device to avoid conceding the competency issue whilst maintaining the strongest possible line against the mischief which the Directive sought to address³¹³. Inevitably, however, the interests which the EC Member States had in common made it expedient for them to develop a particular degree of co-operation and that began in 1975 with the Trevi system, which provided "an intergovernmental forum for member States

³¹⁰ PC Müller-Graff, "The Legal Bases of the Third Pillar and its Position in the Framework of the Union Treaty" (1994) 31 CMLR 493.

³¹¹ The Convention on the establishment of a European Police Office (Europol Convention) (OJ 95/C 316/2) came into force on 1 October 1998.

³¹² Neil Walker, "Current Developments: European Community Law: II Justice and Home Affairs" (1998) 47 ICLQ 231.

³¹³ See 275 below.

to develop common measures, first in respect of counter-terrorism and latterly concerning drugs, organised crime, police training and technology and a range of other policing matters"³¹⁴. It was the UK which suggested the establishment of that group³¹⁵ and, in light of the UK's attitude to the requirement to criminalise in the proposal for the Money Laundering Directive, it is significant that although membership of Trevi was limited to EC Member States, the grouping was kept technically outside the EC framework³¹⁶.

In 1962 the Benelux countries, as a result of a combination of geographical proximity and legal similarities, and under the imperative of the abolition of border controls within the Benelux Economic Union³¹⁷, concluded a treaty³¹⁸ which contemplated, *inter alia*, cross border pursuit by police officers of persons alleged to be guilty of extraditable offences³¹⁹. Beginning in 1985 similar considerations, over a wider geographical area, led and enabled a majority of the member states of the European Union to participate in the Schengen Convention³²⁰ which "contains a number of provisions designed to supplement the 1959 European Convention and the Benelux agreements"³²¹. These include following suspects across borders for the purpose of surveillance, though not arrest³²². Requests for assistance may be sent directly between legal authorities rather than requiring to go through central authorities³²³ and procedural documents may be sent directly by post to persons in the territory of other state parties³²⁴.

³¹⁴ Walker, *op cit*.

³¹⁵ David McClean, *International Judicial Assistance*, Clarendon Press, 1992, 128.

³¹⁶ McClean, *loc cit*.

³¹⁷ See WC Gilmore, *Mutual Assistance in Criminal and Business Regulatory Matters*, Cambridge International Documents Series, Volume 8, Cambridge University Press, 1995, Introduction, xv.

³¹⁸ Benelux Treaty on Extradition and Mutual Assistance in Criminal Matters 1962.

³¹⁹ Article 27.

³²⁰ Convention of 19 June 1990, applying the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the Gradual Abolition of Checks at their Common Borders. For an account of the history and an analysis of Schengen, see Aleidus Woltjer, "Schengen: The Way of No Return?" 2 MJ 256 (1995).

³²¹ Gilmore, *loc cit*.

³²² Article 40.

³²³ Article 53.

³²⁴ Article 52.

Execution of requests for assistance can only be refused where the penalty available for the offence does not reach a minimum threshold-in other words, where the offence is minor-or where what is asked would be unlawful in the requested state³²⁵.

These were, however, measures which addressed particular problems and did not offer a general framework for co-operation in justice and home affairs matters. For the reasons identified above, such a framework became essential with the Single Market introduced in 1992. The Co-ordinators Group on the Free Movement of Persons was established in 1988 to oversee the measures necessitated by what was planned for 1992 and in what was known as the "Palma Document" argued that "the effective functioning of the Community post-1992 demanded that the member States adopt a number of compensatory measures in response to the anticipated loss of national security consequent upon the abolition of internal frontier controls. These should include new measures to tackle international terrorism, drug trafficking and other illegal trade [and] improved police and judicial co-operation"³²⁶. At about the same time the Judicial Co-operation Working Group, which had been part of European Political Co-operation in the late 1970s, was revitalised and there were established the Mutual Assistance Group 1992 and the European Committee to Combat Drugs.

Much of this activity was brought together under Title VI TEU. Those provisions were something of an uneasy hybrid "reflecting continuing ambivalence about the appropriate degree of international control over internal security matters"³²⁷. They are superseded by the restructuring of justice and home affairs matters under the Treaty of Amsterdam. Detailed description of the highly elaborate and multi-layered structure which serves the Third Pillar is unnecessary.

Under the Treaty of Amsterdam certain matters relating to free movement of persons are taken into the First Pillar and the Schengen acquis is incorporated into the framework of the EU. At the time of writing, a Council working group is

³²⁵ Article 51.

³²⁶ Walker, *op cit*, 233.

dealing with the distribution of the *acquis* between the First Pillar and the Third Pillar³²⁸. However, judicial co-operation in criminal matters and police and customs co-operation remain firmly in the Third Pillar. As a result, the structures necessary to serve justice and home affairs matters are rendered somewhat complex and Walker for one anticipates that the benefits of the co-ordinated approach to justice and home affairs matters which TEU sought to achieve might well be endangered by the variable geometry thus introduced³²⁹. He does speculate that it might be that the measures taken by integrationist states will become the standard to which all member States will aspire in due course³³⁰. If he is right about that it would mean that developments within the EU would mirror what happened within the framework of the Council of Europe as regards extradition and mutual legal assistance³³¹, with the UK remaining out of the arrangements until circumstances made such a position untenable.

This is speculative, of course, but not entirely so. It is to be noted that the UK's position as regards Schengen has moved from one of complete refusal to participate to one in which it has, under Article 4 of the Protocol integrating the Schengen *acquis* into the framework of the European Union ("the Schengen Protocol")³³² annexed to the Treaty of Amsterdam³³³, a right at any time to request to take part in some or all of the provisions of the *acquis*³³⁴. In December 1997 a senior Home Office official told the House of Lords Select Committee on the European Communities that "it would be inconsistent with our general stance on internal frontiers for us to want to participate in much of the Schengen co-operation that would be put into the First Pillar. By contrast, in regard to the Third

³²⁷ Walker, *op cit*, 234.

³²⁸ See House of Lords Select Committee on the European Communities, Session 1997-98, 21st Report, *Defining the "Schengen acquis"*, (HL Paper 87), Minutes of Evidence at 1 (evidence of Mr MJ Eland, Home Office).

³²⁹ *Op cit*, 238.

³³⁰ *Loc cit*.

³³¹ See 72 above and 154-158 below.

³³² OJ 97/C 340/93.

³³³ OJ 97/C 340/01.

Pillar, where we have taken the view that we want to co-operate very fully in police and judicial co-operation, there is a presumption that we will want to look very carefully at the scope for co-operating in Schengen arrangements incorporated into the Third Pillar"³³⁵.

The UK attitude to Schengen is significant. For all the rhetoric of successive UK Governments about the importance of international co-operation³³⁶ the much greater readiness to consider participation in matters dealt with under the Third Pillar than in those dealt with under the First suggests that the UK is less ready to subordinate its municipal law to supranational developments than almost any of the other member states of the EU³³⁷.

The Third Pillar extradition conventions

There are 2 Third Pillar extradition conventions, though neither is in force. Both of them proceed under reference to ECE and may be regarded as "daughter" conventions of the sort sanctioned by Article 28(2) ECE. The first, the Convention on simplified extradition procedure between the Member States of the European Union³³⁸, which aims to speed up extradition procedure where the

³³⁴ The right to request to take part is just that—a right to *request*—which requires unanimity on the part of the Schengen member States before it can be granted (Schengen Protocol Art 4); and see House of Lords Select Committee, *Defining the Schengen acquis* (above, n328 at 1)).

³³⁵ House of Lords Select Committee on the European Communities, Session 1997-98, 12th Report, *Evidence by the Minister of State, Home Office, on the United Kingdom Presidency Work Programme on Justice and Home Affairs*, (HL Paper 65) at 2 (evidence of Mr P Edwards).

³³⁶ See Havers, "International co-operation...", the remarks of the Home Office Minister of State (Earl Ferrers) in the Second Reading debate on the Bill which became the 1990 Act (HL Debs Vol 513 (12 December 1989) cols 1214-1221 and now, from a Labour Home Office Minister of State (Ms Joyce Quinn), remarks on the importance, during the UK Presidency, of the usefulness of, and desire to make progress with, co-operation in justice and home affairs (House of Lords Select Committee on the European Communities, Session 1997-98, 12th Report, *Evidence by the Minister of State...* at 1).

³³⁷ The UK thinks that Ireland shares its views (see House of Lords Select Committee on the European Communities, Session 1997-98, 12th Report, *Evidence by the Minister of State...* at 3). Barrett, however, implies that Ireland has gone along with the UK with regard to Schengen because the UK attitude to abolition of border controls has placed Ireland in a difficult position (see Gavin Barrett (ed), *Justice Co-operation in the European Union*, Institute of European Affairs, 1997, at ix and at 7).

³³⁸ OJ 95/C 78/2.

accused consents to return, by reducing the attendant formalities³³⁹. Such simplified procedure with consent is not to be found in ECE but is clearly and explicitly contemplated by UK law³⁴⁰. The UK was not, therefore, in the negotiations for the Convention, faced with any fundamental incompatibility between the Convention and municipal law.

The Convention relating to extradition between the member States of the European Union³⁴¹ is a more ambitious instrument, which *inter alia* seeks to eliminate or substantially reduce the application of the political offence exception as between EU member states³⁴² and to eliminate or substantially reduce refusal to extradite own nationals³⁴³. The UK was amongst the states which pressed for this development³⁴⁴. Amongst other things, the effect which the Convention would have on the political offence exception would greatly reduce the effect of the reservations made by other States to the European Convention on the Suppression of Terrorism³⁴⁵.

Much of the Convention is consistent with existing UK law. The UK will not, for example, have any difficulty in making extradition available for conspiracy to commit one of a range of specified offences³⁴⁶. On the contrary, the use which English law makes of the offence of conspiracy is sufficiently significant that the acceptance by civilian states of an obligation to extradite in conspiracy cases can only work to the advantage of the UK. Scots law makes less use of conspiracy charges and is therefore likely to be less affected by this development. Legislation is, however, likely to be required to permit the UK to

³³⁹ For discussion of the convention in some detail, see G Vermeulen and T Vander Beken, "Extradition in the European Union: State of the Art..." and the similar article by the same authors, "New Conventions on Extradition in the European Union..."

³⁴⁰ 1989 Act s14.

³⁴¹ OJ 96/C 313/02.

³⁴² Article 5.

³⁴³ Article 7.

³⁴⁴ Draft Report from Permanent Representatives Committee to Council (Justice and Home Affairs) Doc 10318/93 JUSTPEN 11, 22 November 1993; and Home Office Briefing document dated 12 May 1994 for meeting of Steering Group III on 20 May 1994 (copies of both on file with writer).

³⁴⁵ See 49 above.

³⁴⁶ Article 3.

implement at least Articles 2 and 11. Article 2 modifies the definition of extradition crimes so as to retain the one-year's imprisonment threshold as regards the requesting state but so as to reduce the threshold in the law of the requested state to 6 months. That said, the bands of sentencing options available to UK courts are sufficiently wide that it seems likely that only a limited range of offences would be brought newly within the scope of extradition by Article 2. The narrower sentencing bands typically available in civilian jurisdictions might mean that the provision would have a more significant effect in the case of requests made *by* the UK.

Article 11 is permissive. It allows states to declare that consent to waiver of the specialty rule may be presumed to have been granted. The UK is not, of course, obliged to make such a declaration and has in place a reservation to ECE permitting it to insist on the application of the rule of specialty³⁴⁷.

The Action Plan to Combat Organised Crime set a target of the end of 1998 for the ratification of these two conventions. That target was missed and there seems to be no immediate prospect of completion of the ratification process.

The Commonwealth

Introduction

The UK/US treaty exemplifies the UK's traditional bilateral approach to extradition arrangements. ECE is the foundation of developing European practice and is the multilateral treaty which provides the context for much of the UK's current extradition business. There are, however, other categories of arrangement which require our attention, though not in the same detail as was necessary for the UK/US treaty and ECE. The most important of these is the Commonwealth Scheme Relating to the Rendition of Fugitive Offenders ("the Commonwealth Rendition Scheme").

The Scheme is derived from Westminster's historic right to legislate for the Empire. The Fugitive Offenders Act 1881 set out rules for rendition of alleged fugitive offenders within the Empire, including a backing of warrants arrangement

where colonies were contiguous³⁴⁸. It was "an imperial Act applying throughout HM dominions, which provided for the return of fugitive offenders between the various parts of a widely dispersed colonial empire and certain features commonly found in extradition treaties were absent from it eg a list of returnable offences and restrictions on the return of political offenders"³⁴⁹. At this stage, of course, it was effectively UK law which governed rendition throughout the colonies and, for that matter, between colonies and third states. When the UK concluded its 1901 extradition treaty with Belgium, that treaty applied not only to the UK itself but also to the colonies³⁵⁰.

The justification for the use of imperial legislation was that "Her Majesty could hardly enter into a treaty with a territory which was part of her dominions. Imperial legislation, and not a treaty arrangement, was the appropriate method of establishing a relationship, such as is involved in extradition, between a metropolitan power and its colonies"³⁵¹.

The 1881 Act proved, in time, to be "an unsatisfactory basis upon which to conduct extradition between parts of the Commonwealth which had since evolved from colonies, protectorates or trust territories into independent Sovereign States"³⁵². Accordingly discussions were held to establish new arrangements. Although it would have been open to the Commonwealth to proceed by multilateral treaty (and that course was considered³⁵³), it had not been the practice for Commonwealth agreements to take treaty form and it was considered that similarities in the legislation of the various Commonwealth countries made it

³⁴⁷ See European Convention on Extradition Order 1990, Schedule 4, Article 14.

³⁴⁸ Such an arrangement still exists between New Zealand and Australia.

³⁴⁹ *Report of the Working Party on the Extradition Act 1870*, 1974, 9.

³⁵⁰ Article XIV.

³⁵¹ PL Robinson, "The Commonwealth Scheme Relating to the Rendition of Fugitive Offenders: A Critical Appraisal of Some Essential Elements" (1984) 33 ICLQ 614. One consequence of this is that the current Canadian extradition legislation (contained in the Extradition Act 1985 (RSC 1985, c E-23) may be traced directly back to the 1870 Act, through the (Canadian) Extradition Act 1877.

³⁵² IA Shearer, "Commonwealth Extradition Arrangements: Explanatory Documentation prepared for Commonwealth Jurisdictions", in *Schemes Relating to Mutual Assistance in the Administration of Justice within the Commonwealth, Volume Five, Part 1*, Commonwealth Secretariat, 1989, 219.

³⁵³ *Report of the Working Party on the Extradition Act 1870*, 1974, 16.

possible for another course to be followed³⁵⁴. Those similarities existed and still exist in some cases because the UK Fugitive Offenders Act 1881 applied by paramount force³⁵⁵ and because much of that legislation was modelled very closely on the 1870 Act. In Canada, for example, the current extradition legislation, contained in the Extradition Act 1985 is almost identical to the (Canadian) Extradition Act 1877, which was based very closely indeed on the (UK) Extradition Act 1870. Blanchflower tells us that the current Canadian legislation "has similar definitions, provisions, procedures and forms as the United Kingdom's 1870 Act"³⁵⁶.

The arrangements which were arrived at were contained in the Commonwealth Rendition Scheme. That Scheme is "not a treaty; it is a basis agreed among the member states for national legislation conforming substantially³⁵⁷ thereto in order to achieve reciprocity and similarity of procedures"³⁵⁸. Rendition arrangements within the Commonwealth depend, therefore, on the content of municipal law.

The critical difference between the Scheme and a treaty is that the Scheme imposes no obligation to surrender fugitives. Beyond that, however, the Scheme is difficult to distinguish from a multilateral treaty³⁵⁹. Indeed, since the Scheme is written under reference to similarities in legislation and since that legislation, in all Commonwealth countries, owes a great deal to the 1870 Act, the Scheme comes very close to being the erection of aspects of English criminal procedure law into a multilateral international instrument.

The UK legislation which gave effect to the Scheme was the Fugitive

³⁵⁴ *Ibid.*

³⁵⁵ Dianne Stafford, "Combating Transnational Crime: The Role of the Commonwealth" in Peter J Cullen and William C Gilmore (eds) *Crimes sans Frontières*, Hume Papers on Public Policy, Edinburgh University Press, 1998, 44, 45.

³⁵⁶ MC Blanchflower, "Interpretation and Application of Extradition Crime in the Extradition Act" (1992) 34 *Criminal Law Quarterly* 158 at 166-7.

³⁵⁷ In 1989 the Commonwealth Secretariat published a revised version of its *Survey of Extradition and Fugitive Offenders Legislation as Between Commonwealth Jurisdictions*, listing all of the relevant legislation in Commonwealth countries as it then stood.

³⁵⁸ IA Shearer *op cit*, 217.

³⁵⁹ See Gilbert, *Transnational Fugitive Offenders in International Law*, 42.

Offenders Act 1967, under which (by contrast with the 1870 Act) the Scottish courts did have a jurisdiction. That Act is now consolidated in the 1989 Act. Procedures under Part III of the 1989 Act apply to all colonies³⁶⁰ and are applied to Commonwealth countries by designation by Order in Council³⁶¹.

By 1989, 37 countries had legislated in accordance with the Commonwealth Rendition Scheme and the UK Fugitive Offenders legislation had been applied by Order in Council to a further 14³⁶². Most of those countries already had extradition legislation which followed the UK model quite closely. It was this similarity which made the Scheme possible; but the Scheme itself is a constraining influence on the development of extradition practice in Commonwealth countries. Few states, having enacted legislation to give effect to one rendition scheme, will wish to have to operate an entirely different kind of scheme in parallel. Even the UK has tried hard to ensure that the main body of the 1989 Act applies both to its partners in ECE and to those in the Commonwealth Scheme. So Robinson has criticised the Scheme on the ground that "in perpetuating the UK's dichotomous approach to extradition [it] has imposed on Commonwealth countries which have adopted it the burden of a system of extradition which is unnecessarily confusing and difficult to apply by a country seeking to unify and integrate its extradition laws in relation to all other States"³⁶³.

The content of the Scheme

Clause 1 states that the provisions of the Scheme will govern the return of a fugitive offender from one part of the Commonwealth, in which he is found, to another, in which he is accused of an offence. It specifies that return will only be precluded by law or subject to refusal by the competent executive authority in the circumstances mentioned in the Scheme. As in extradition treaties, therefore, the position is that rendition will be made unless the case is brought within a

³⁶⁰ 1989 Act s5(2).

³⁶¹ 1989 Act s5(1) and (3). The Order made is the Extradition (Designated Commonwealth Countries) Order 1991 (SI 1991 No 1700).

³⁶² *Survey of Extradition and Fugitive Offenders Legislation as Between Commonwealth Jurisdictions*, Commonwealth Secretariat, 1989.

³⁶³ *Op cit*, 617.

particular ground of refusal. Clause 2 of the Scheme provides that a fugitive will only be returned for a "returnable offence". The expression "extradition crime" is avoided, as is the word "extradition" throughout the Scheme, reflecting the absence of obligation creating provisions. Returnable offences were originally identified by the enumerative method, following UK practice and using a list of offences identified by their English law names (and hence, of course, the names by which they were known in the overwhelming majority of Commonwealth States). Returnable offences are now, however, identified by the eliminative method, as offences which are punishable in both affected parts of the Commonwealth by imprisonment for two years or a greater penalty. That change followed a change in Australian law to the eliminative method and a proposal by Australia which noted not merely that there was a move internationally towards that method but also that the UK 1986 White Paper proposed such a change for UK law³⁶⁴. To that extent, UK law was still exercising a persuasive authority on the content of the Scheme. It should also be said that Australia called attention in its proposal to the fact that the eliminative method was preferred by most European countries³⁶⁵.

Clauses 5 to 15 provide a detailed procedural code which is strikingly similar to that which existed and exists under the UK extradition legislation. We do not need to examine that code in detail. It is, by and large, "nuts and bolts" stuff. Its significance for our present purposes lies in its clear origins in English law. In relation to the Commonwealth Scheme, the relationship between international law and national law is, in general, clear. The Scheme is derived from English law and shows substantial English law influence. It shows no Scots law influence. Moreover, it depends on national law. International obligations are not part of the arrangements.

One of the clearest derivations from English law is clause 5(4). In terms of that clause, the court may commit the fugitive to prison to await his return if "(a)

³⁶⁴ Government of Australia, "Suggestions for a Review of the Scheme Relating to the Rendition of Fugitive Offenders within the Commonwealth", Doc LMM(86)5, paras 4, 5 and 9.

such evidence is produced as establishes a *prima facie* case that he committed the offence of which he is accused, and (b) his return is not precluded by law". Otherwise, he is to be discharged. The *prima facie* case requirement has thus been retained in the Scheme despite an Australian proposal in 1986 to dispense with it³⁶⁶. That proposal pointed out that it is the requirement that evidence to establish a *prima facie* case be admissible under the laws of the requested country which "has in the past permitted fugitives to evade justice on technical as opposed to meritorious grounds". Australia (which had dispensed with the requirement in its own law) argued that the mutual trust which is fundamental to the existence of extradition arrangements obviates a need for critical analysis of the evidence and that the fugitive is adequately protected by the restrictions on return which are found in paragraph 10 of the Scheme. This is similar to the basis on which the UK Government was to justify the abrogation of the *prima facie* case requirement as regards ECE states and similar too to the reasoning which leads Dutch law, for example, to assume that the authorities of the requesting state do not seek extradition without good reason, so making a *prima facie* case requirement irrelevant³⁶⁷. Noting that the UK was to abolish the requirement as regards non-Commonwealth states, Australia argued that within the Commonwealth, where there is a common legal heritage, there would appear to be no need for the *prima facie* case requirement.

Notwithstanding such persuasive effect as the UK's proposed change may have had, the Australian proposal did not meet with sufficient approval to give it effect. It is recorded in a Discussion Paper prepared by Canada for the meeting of Commonwealth Senior Officials in June 1989³⁶⁸ that there was a Canadian objection to the notion that the adequacy of evidence should not be determined by

³⁶⁵ Paragraph 6 of the Proposal.

³⁶⁶ Government of Australia, "Suggestions for a Review... , paras 10-14.

³⁶⁷ Swart, "Extradition", 118.

³⁶⁸ Government of Canada (Department of Justice), "Discussion Paper: Proposals for Modification of the Requirement for a *Prima Facie* Case under Article 5 of the London Scheme on the Rendition of Fugitive Offenders between Member States of the Commonwealth", in *Schemes*

the courts of the requested country. Canada did, however, recognise not only that the requirement as it stood was too onerous but also that the procedures required to satisfy it were too "prolix, time consuming and costly".

Canada noted that the theory that procedure and standards should be similar to municipal committal proceedings so as to promote equality of treatment among all persons put in jeopardy before the municipal courts falls down where non common law states are required to comply with standards radically different from their own. Canada made specific proposals to address the deleterious effect which the *prima facie* case requirement has on international law enforcement. The crux of those proposals was to permit the court in the requested jurisdiction to receive an authenticated "record of the case" including a "distinct and specific enumeration of the evidence". Such a requirement could be satisfied without difficulty under Scottish practice because the Crown Precognition, which is a volume containing the precognitions of witnesses, is required (by instructions internal to the Procurator Fiscal Service) to contain both a narrative of the facts of the case and an analysis of the evidence³⁶⁹. The Canadian proposal met with general, but by no means unanimous, approval³⁷⁰ and was given effect by Annex 3 to the Scheme. Clause 19(2) contemplates that two or more parts of the Commonwealth may agree that this annex will replace clause 5(4); otherwise the *prima facie* case requirement remains in the Scheme.

Ireland

There are certain parallels between the arrangements which apply to the Commonwealth and those which apply to Ireland, though the arrangements with Ireland are not the subject of any international law instrument. A system of backing of warrants developed whilst Ireland was still part of the United

Relating to Mutual Assistance in the Administration of Justice within the Commonwealth, Vol 5, Part 1, Commonwealth Secretariat, 1989, 251.

³⁶⁹ Crown Office and Procurator Fiscal Service, *Book of Regulations*, 1984 and updates, para 4(29)(xii-xiii).

³⁷⁰ See Commonwealth Law Ministers, "Communique", para 15, in *1990 Meeting of Commonwealth Law Ministers and Senior Officials, Memoranda Part 1*, xi.

Kingdom³⁷¹ and, as befitted what were domestic arrangements, that system was founded on legislation and not upon treaty. The system continued to operate following the establishment of the Irish Free State in 1921 but in 1965 the decisions of two courts, one British and one Irish, brought this arrangement to an end and necessitated its being placed on a proper legislative footing. The House of Lords held, in *R v Metropolitan Police Commissioner ex p Hammond*³⁷², that the continued operation of the system was incompatible with Ireland's status as an independent state and the Irish Supreme Court held, in *State (Quinn) v Ryan*³⁷³ that it was unconstitutional because it denied the person arrested in Ireland the opportunity to seek redress in the (Irish) High Court³⁷⁴. There had in fact been earlier attempts to challenge the system, which had come to nothing³⁷⁵, but the *Ryan* case occurred after the system of endorsing warrants broke down in practice³⁷⁶ and the Garda and the Royal Ulster Constabulary, in a premature and unfortunate flowering of police co-operation, began the mutual and unregulated surrender of persons with a fine disregard for the existence of a national border.

It would at this point have been possible for the UK and Ireland to have concluded a bilateral extradition treaty. They chose not to do so. Instead, the arrangement was overhauled and set out in reciprocal legislation. The UK statute is the Backing of Warrants (Republic of Ireland) Act 1965 ("the 1965 Act")³⁷⁷. The municipal legislation, in the arrangements with Ireland, entirely excludes any international instrument of any kind. Municipal law not only dominates the field; it occupies it completely. Aspects of that law are considered below³⁷⁸.

³⁷¹ M McGrath, M, "Extradition: Another Irish Problem" [1983] 34 *Northern Ireland Legal Quarterly* 292.

³⁷² [1965] AC 810.

³⁷³ [1965] IR 70.

³⁷⁴ See especially Kingsmill-Moore J at 123.

³⁷⁵ *State (Dowling) v Kingston* (1937) ILTR 225; *State (Duggan) v Tapley* (1951) ILTR 22 (in which the Court also rejected the proposition that the political offence exception is a matter of customary international law).

³⁷⁶ See M McGrath, *op cit* 295.

³⁷⁷ The Irish equivalent is Part III of the Extradition Act 1965, which legislation was enacted to enable Ireland to ratify the European Convention.

³⁷⁸ See 132.

Article 6 of the 1988 UN Drugs Convention

Bilateral extradition treaties, multilateral extradition conventions such as ECE and arrangements such as the Commonwealth Scheme are all concerned with adjectival law and form part of what Cassese has called "an emerging branch of law, namely the law of international criminal procedure"³⁷⁹. Many multilateral conventions in the criminal law field, however, deal with particular substantive crimes of international interest. It is common for such conventions to include provisions as to extradition³⁸⁰ and these have been becoming longer and more comprehensive from Convention to Convention over the years. The 1988 UN Drugs Convention was intended to be a "comprehensive, effective and operative" instrument directed specifically against illicit drug trafficking³⁸¹ and Article 6 makes provision, in 12 sub-paragraphs, for extradition³⁸². Overall, it bears a certain resemblance to the UN Model Treaty on Extradition. This is hardly surprising, since the Model Treaty was developed after wide consultation and adopted by the General Assembly in 1990³⁸³, less than two years after adoption of the 1988 Drugs Convention. It is intended by the UN "to be used as a basis for international co-operation and national action against organised crime and terrorist crime"³⁸⁴ and to provide a "frame of reference for negotiating States"³⁸⁵. Moreover, Article 6 was never intended to amount to a detailed mini-treaty on extradition. There were already well developed extradition mechanisms in place in relation to drug trafficking³⁸⁶.

It is very important to remember that the UK was not negotiating the

³⁷⁹ Antonio Cassese, "Opinion: The International Criminal Tribunal for the Former Yugoslavia and Human Rights" 1997 EHRLR 329.

³⁸⁰ See, for example, Article 8 of the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others 1949 and Articles 8-10 of the International Convention Against the Taking of Hostages 1979.

³⁸¹ Preamble.

³⁸² Article 8 of the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others 1949 had only 3 sub-paragraphs.

³⁸³ *International Review of Criminal Policy*, Nos 45 and 46, 1995, Preface, iv.

³⁸⁴ *Loc cit.*

³⁸⁵ *Op cit.*, iii.

³⁸⁶ See United Nations, *Commentary on the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988*, UN Doc E/CN.7/590, 1998, 152.

extradition provisions in isolation from the rest of the Convention. The UK had become seriously concerned about its growing drug problem and this concern had become the impetus for serious engagement in international efforts to combat that problem³⁸⁷. Although the Minister of State for the Home Office was speaking with particular reference to forms of judicial assistance other than extradition when he said "[h]aving recognised the inadequacies of our existing legislation, we have been determined to secure arrangements which will place us in the first rank internationally in our ability to co-operate with other countries in this most important of areas"³⁸⁸, his comment was made in the context of legislation³⁸⁹ which was itself a response to drug trafficking in particular³⁹⁰. What he said sums up rather accurately the approach which the UK was taking in the late 1980s to all international initiatives which addressed drug trafficking³⁹¹. It is unlikely, therefore, that the UK would have been prepared to see the negotiations for the 1988 Convention as a whole founder on disagreements over extradition or that the UK would have declined to become party to the Convention over doubts about Article 6 unless there had been thought to be some fundamental incompatibility between that Article and the principles upon which the UK criminal justice systems were perceived to be founded. As the Minister of State said during the Third Reading debate on the 1990 Act, "our view was that the most important consideration of all was that the United Kingdom should ratify the [1988] Vienna Convention as soon as possible"³⁹².

It might well be that this position was easier for the UK to arrive at because what was to become Article 2 of the Convention was interpreted during the Conference to Adopt as expressing "the principle of the supremacy of

³⁸⁷ See William C Gilmore, "International Action Against Drug Trafficking: Trends in United Kingdom Law and Practice" 24 Int'l Law 365 (1990) for a particularly clear account of the way in which UK involvement on the international plane was prompted by the drug problem.

³⁸⁸ HL Debs, Vol 513, 12 December 1989, Col 1217.

³⁸⁹ The 1990 Act.

³⁹⁰ See Harding, *op cit*.

³⁹¹ So, for example, after years of hesitation about the United Nations Convention on Psychotropic Substances 1971 the UK put its doubts aside and ratified in 1986 (see Gilmore, "International Action Against Drug Trafficking: Trends...", 367).

domestic law"³⁹³. That Article, which deals with the scope of the Convention, states that Parties will take the necessary measures to comply with the Convention "in conformity with the fundamental provisions of their domestic legislative systems", that they will carry out their obligations "in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-interference in the domestic affairs of other States" and that "a Party shall not undertake in the territory of another Party the exercise of jurisdiction and performance of functions which are exclusively reserved for the authorities of that other Party by its domestic law".

The terms of Article 2, the fact that it was introduced as an amendment by Canada and Mexico and the opposition which it provoked from the USA³⁹⁴ give rise to the suspicion that, although neither Canada nor Mexico said as much, it was actually intended as a means of denying the USA the opportunity of invoking the Convention in support of its extraterritorial law enforcement activities³⁹⁵. Be that as it may, it was understood at the Conference as stating the supremacy of municipal law; and that position was entirely consistent with the traditional UK perception.

Article 6(2) requires that each of the offences to which the Article applies should be deemed to be included as an extraditable offence in any extradition treaty existing between Parties and must be included as extradition offences in any

³⁹² HL Debs Vol 515, 15 February 1990, Col 1472.

³⁹³ United Nations Conference for the Adoption of a Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, *Official Records* Vol II, Summary Records of Meetings of the Committees of the Whole (UN Doc E/CONF.82/3 and Corr.1) at 173 (intervention of Mr Schutte).

³⁹⁴ United Nations Conference for the Adoption of a Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, *Official Records* Vol II, at 155-7.

³⁹⁵ As Abramovsky has described the position, "the United States has faced...problems when conducting law enforcement operations in such countries as Colombia and Mexico...[and has] employed several means of sanctioning individuals and countries who pose a threat to US law enforcement, ranging from diplomatic and economic sanctions to aggressive pursuit or even outright kidnapping of persons suspected of murdering US law enforcement agents. *Thus, where co-operation is not forthcoming from foreign authorities, the United States has acted to compel it*" (Abraham Abramovsky, "Prosecuting the 'Russian Mafia': Recent Russian Legislation and Increased Bilateral Co-operation May Provide the Means" 37 *Virginia Journal of International Law* 191, 205 (1996) (emphasis added)).

future extradition treaty. This general approach has been in use in such conventions for a considerable period of time³⁹⁶ but it is worth noting that Canada at least perceived the mandatory nature of the provision as a significant advance over the equivalent, but merely hortatory, provision in the 1971 Psychotropic Substances Convention³⁹⁷.

Article 6 applies³⁹⁸ to those offences established in terms of Article 3(1), which was intended to be "an all-inclusive list of illicit drug trafficking offences"³⁹⁹. The extradition arrangements in the Convention are therefore limited to drug trafficking, which was the subject matter of the Convention, but apply to all those aspects of drug trafficking of which the Conference could conceive. This approach has more in common with the enumerative approach than with the eliminative⁴⁰⁰ but it has two important differences from the standard "list" based enumerative method. First, Article 3(1), and hence Article 6, deal with conduct, not with *nomen iuris*. And secondly, Article 3(4) requires parties to make the Article 3(1) offences liable to sanctions "which take into account the grave nature of these offences, such as imprisonment". It is, therefore, likely that an eliminative approach would be satisfied and this may well be one of the matters which underlies Article 6(5) which makes extradition subject to conditions provided for by the law of the requested party. Many states, including in particular those which are party to ECE, have extradition legislation which adopts the eliminative method. This particular approach to defining the crimes to which extradition applies achieves the combination of the enumerative and the eliminative at which the UK/US Treaty seems to aim without the complexities demonstrated in *Jennings*.

³⁹⁶ Once again, Article 8 of the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others 1949 provides an example.

³⁹⁷ "Draft Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances" 1988 *Canadian Yearbook of International Law* 308, 309.

³⁹⁸ Paragraph (1).

³⁹⁹ "Report of the United States Delegation to the United Nations Conference for the Adoption of a Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances" (reproduced in *International Efforts to Combat Money Laundering*, ed W Gilmore, Grotius, 1992, 101).

⁴⁰⁰ Article 2 of the UN Model Treaty adopts the eliminative approach.

Special extradition arrangements

The final type of international extradition arrangement which we need to note is the possibility of the special extradition arrangement contemplated by section 15 of the 1989 Act. Such arrangements relate to particular individuals and only one has so far been made⁴⁰¹. That was an arrangement made in 1993 with Brazil, which is believed to have related to one Paolo Cesar Farias⁴⁰². The procedure is that the Secretary of State issues a certificate which embodies the extradition arrangements⁴⁰³. In the case of the arrangement with Brazil, the arrangement⁴⁰⁴ was based very closely on the 1989 Act. Although Home Office say that “by their nature special arrangements are exceptional” and that the text of the arrangement “is not to be considered as a model text”, it nevertheless seems likely that any future section 15 arrangement would also start from the 1989 Act. There are two things to be said about that. The first is that, in the case of an arrangement with Brazil, such an approach would accord well with that country’s own approach to extradition, which is based on reciprocity as a self sufficient basis for extradition without treaty⁴⁰⁵. The second is that the basing of the arrangement on the 1989 Act rather than on any of the treaty models available both constitutes a further piece of evidence of the dominance of municipal law and renders further consideration of the arrangement unnecessary.

Municipal law

Introduction

It is convenient to treat extradition procedure under the 1989 Act as having three phases. The first pertains to the arrest of the fugitive, the second is the judicial phase and the final phase is the “executive” phase, in which the Secretary of State decides whether or not to surrender a fugitive who has been found by the courts to

⁴⁰¹ Except as otherwise indicated, the information about this arrangement comes from a letter received by the writer from the Home Office Organised and International Crime Directorate, Judicial Co-operation Unit, dated 3 November 1998.

⁴⁰² “Britain ‘to extradite Brazilian’”, *The Times*, 4 November 1993.

⁴⁰³ 1989 Act s15(2).

⁴⁰⁴ Copy on file with writer but subject to Home Office embargo on wider circulation.

⁴⁰⁵ See José Francisco Rezek, “Reciprocity as a Basis of Extradition” 1981 LII BYb Int’l L 171.

be liable to extradition. This tripartite division provides the main framework for our consideration of municipal legislation. It will also be necessary to take a little time to consider the position of the fugitive returned to the UK.

The arrest phase

The UK's international extradition arrangements have little to say about the arrest of the fugitive. That matter is left almost exclusively to municipal law. ECE is typical. The issue is addressed only in Article 16, which permits the requesting state to seek provisional arrest in case of urgency, sets out the minimum requirements for the content of such a request and places an absolute time limit of 40 days on the continuation of provisional arrest if the full extradition request is not received within that time. Article 5 ECHR is, however, of some relevance. Article 5(1) states the general principle that there is a right to liberty and that, before deprivation of liberty will be compatible with the Convention, it must be brought within one of the six heads of exceptions to the general right permitted by Article 5(1) subparagraphs (a) to (f)⁴⁰⁶. Subparagraph (f) permits "the lawful arrest or detention of a person ... against whom action is being taken with a view to ... extradition", so that arrest with a view to extradition is within the contemplation of the Convention⁴⁰⁷. The need, in terms of ECHR, for the arrest phase of extradition to be regulated by municipal law appears most clearly from *Bozano v France*⁴⁰⁸. In that case the applicant had been the subject of an unsuccessful extradition request to France from Italy. He was released following the failure of the request. About a month later, 3 plain clothes policemen forced him into an unmarked car. He was taken to Police Headquarters and served with a deportation order. He was then placed in a car and taken, not to the Spanish border (which was the closest) but to the Swiss border, twelve hours and several hundred kilometres away. From Switzerland he was extradited to Italy and there incarcerated to serve the life sentence which had been imposed on him in his

⁴⁰⁶ See Francis G Jacobs and Robin CA White, *The European Convention on Human Rights*, 2nd edition, Clarendon Press, 1996, 80.

⁴⁰⁷ It was, however, held in *Quinn v France* (1995) 21 EHRR 529 that there was a breach where the French authorities held the applicant in custody while they solicited an extradition request.

absence. Viewing the circumstances as a whole, ECtHR concluded that the applicant's deprivation of liberty was neither lawful nor compatible with the right to security of person and there had been a breach of Article 5(1).

There have been no reported cases from the UK of such disregard for the rule of law⁴⁰⁹; but France is a developed, western democracy and the fact that *Bozano* could happen there should cause the UK to hesitate before making any claims about the impossibility of such an occurrence here. On the assumption, however, that, where the UK receives a request for the extradition of a person who is found in Scotland, municipal law is applied correctly and the kind of rendition which occurred in *Bozano* is not attempted, the position will be as follows.

The two preconditions for extradition from the UK are that the request relates to an extradition crime within the meaning of UK law and that there is an extradition arrangement in place between the UK and the requesting state concerned⁴¹⁰.

The move from the enumerative to the eliminative criterion in defining "extradition crime" was achieved by section 1(5) of the 1988 Act and consolidated in section 2(1) of the 1989 Act. The change followed a recommendation of the 1982 Working Party⁴¹¹, endorsed by the Government in the Green Paper, *Extradition*⁴¹². Perhaps because the change did not provoke significant controversy⁴¹³, the arguments are not elaborated in much detail anywhere. The fullest account comes in the 1982 Working Party Report⁴¹⁴ and it is clear from that that it was the inflexibility of the enumerative system which persuaded the Working Party that there should be change. Reference was made to Article 2(1) ECE but that was as an example and model of an eliminative approach, not as an argument in favour of the adoption of such an approach.

⁴⁰⁸ *Supra*.

⁴⁰⁹ But see *Amekrane and Others v United Kingdom* 16 YB 356 (1973), which comes quite close.

⁴¹⁰ 1989 Act s1.

⁴¹¹ *Op cit*, paras 3.3-3.24.

⁴¹² *Op cit*.

⁴¹³ The eliminative approach was already in use with Ireland.

⁴¹⁴ *Loc cit*.

The necessity for the existence of an extradition arrangement has been a feature of UK law since before the 1870 Act and is provided for by section 1(1) of the 1989 Act. The arrangement may be a treaty embodied in an Order in Council⁴¹⁵, the Commonwealth Rendition Scheme (where the requesting State is designated under the Extradition (Designated Commonwealth Countries) Order 1991⁴¹⁶, made under section 5(1) of the 1989 Act) or a treaty embodied in an Order in Council made under the 1870 Act⁴¹⁷, in which case procedure is governed by Schedule 1 to the 1989 Act. The Scottish courts have no jurisdiction as regards Schedule 1 and that Schedule is, therefore, not further considered. As noted above, the only treaty of practical importance to which Schedule 1 procedure applies is that with the USA; but the amount of traffic with the USA is, of course, such that the omission of that Treaty from the jurisdiction of the Scottish courts is significant.

The preconditions being satisfied, the first step is the issue of a warrant for arrest. No arrest for an extradition crime is lawful in domestic law without a warrant⁴¹⁸. This may be either a warrant following the receipt of an “authority to proceed” or a provisional warrant. An authority to proceed may be issued by the Secretary of State in pursuance of the receipt of an extradition request which furnishes particulars of the person whose return is requested, particulars of the offence of which he is accused and either the foreign warrant or a certificate of conviction⁴¹⁹. Such an authority is capable of being held to be defective where it does not specify what offence would have been committed in the UK had the facts occurred here (as is required by the dual criminality requirement)⁴²⁰.

Both sorts of warrant may be issued by a metropolitan magistrate or by the sheriff of Lothian and Borders. A provisional warrant may be issued by a metropolitan magistrate, a justice of the peace in any part of the UK or by a

⁴¹⁵ 1989 Act s4(1).

⁴¹⁶ SI 1991 No 1700.

⁴¹⁷ 1989 Act s1(3).

⁴¹⁸ *Diamond v Minter* [1941] KB 656.

⁴¹⁹ Section 7.

⁴²⁰ *In re Farinha* [1992] COD 602.

sheriff, but only where there is information that the person is, or is believed to be in or on his way to, the UK. In either case, the test is that the grantor of the warrant must have been supplied with such information as would justify the issue of a warrant of arrest in a domestic case⁴²¹. The application of this test was said, in *R v Weil*⁴²² to be entirely a matter of discretion. Following *ex p Pinochet Ugarte (No 3)*⁴²³, that comment must now be read subject to the (rather obvious) qualification that the offences for which extradition is sought must be extradition crimes.

Where a provisional warrant is issued, notice must be given to the Secretary of State⁴²⁴ who may either cancel the warrant or issue an authority to proceed⁴²⁵. In English law at least, the Secretary of State's decision is amenable to judicial review; though in relation to *Pinochet* the (English) High Court has taken the view that judicial review at this stage "would needlessly disrupt the extradition process and postpone the machinery which will afford General Pinochet every proper opportunity to advance his case and protect his position"⁴²⁶.

All of this addresses the fundamental requirement of Article 5 ECHR that there should be a procedure prescribed by law. The rules described are not significantly different from those which were set out in the 1870 Act. The position is that, to this extent, UK municipal law is consistent with ECHR but it cannot be said that it has been influenced by ECHR. The same may be said as regards the particular rights which Article 5(2) and (4) desiderate for the person who has been arrested.

Section 9(1) of the 1989 Act provides, *inter alia*, that a person arrested in pursuance of a warrant under section 8 must be brought as soon as possible before a court consisting of the sheriff of Lothian and Borders. That court is given the

⁴²¹ Section 8(3) and (3A).

⁴²² (1892) 9 QBD 710.

⁴²³ See 114 below.

⁴²⁴ The Act simply refers to the "Secretary of State". For Scotland, the functions of the Secretary of State under the 1989 Act are performed by the Secretary of State for Scotland.

⁴²⁵ Section 8.

like powers as if the proceedings were summary proceedings in respect of an offence alleged to have been committed by the fugitive. The effect of this, it is suggested, is to place the arrested fugitive in as nearly as possible the same procedural position as he would have been in had he been arrested in connection with a purely domestic matter. Article 5(4) ECHR requires that everyone who is arrested must be entitled to take proceedings by which the lawfulness of his detention is decided speedily by a court and his release ordered if the detention is not lawful. In this context, we may refer to the case of *Bennett, Petitioner*⁴²⁷.

A petition warrant had been issued in Aberdeen for the arrest of Bennett on charges of fraud. He was also the subject of an English arrest warrant in relation to charges of deception. Bennett was arrested in South Africa, having entered that country from Australia on a false passport. The South African authorities decided to deport him and, for reasons which were a matter of some dispute, chose to put him on a flight which stopped over at Heathrow, where he was arrested on the English warrant. He was in due course able to persuade the Divisional Court that there had been impropriety in the deportation via Heathrow⁴²⁸ and had already persuaded the House of Lords that impropriety of that sort should lead to the quashing of his committal for trial in England⁴²⁹. However, the English committal having been quashed (and Bennett's attempt to prevent the English police from executing the Scottish warrant having failed⁴³⁰), *Bennett* was arrested on the Scottish warrant and petitioned the *nobile officium* of the High Court, seeking to suspend the warrant, it being argued on his behalf that there had been illegality in the manner of his return to the UK (as the English courts had found). In the event, the High Court held that there had been no illegality in the events which resulted in the petitioner's return to the UK (in other words, that the English Divisional Court had arrived at the wrong result on the

⁴²⁶ Ognall, J, reported in "Pinochet bid for judicial review fails", *The Times*, Friday May 28, 1999, 10.

⁴²⁷ 1995 SLT 510.

⁴²⁸ *R v Horsferry Road Magistrates' Court ex p Bennett (No 3)* [1994] TLR 187.

⁴²⁹ *R v Horsferry Road Magistrates' Court, ex p Bennett* [1994] AC 42.

⁴³⁰ *R v Commissioner of Police of the Metropolis ex p Bennett* [1995] QB 313.

facts) and that accordingly the issue did not arise. If, however, it had been held that there had been illegality in the return of the petitioner there would have arisen the question whether his continuing detention was consistent with article 5(4) ECHR. The answer might well have been that it was⁴³¹.

The judicial phase

Introduction

The relationship between international law and the law which governs the hearing in the court of committal is somewhat complex. We can begin, however, by setting to one side issues which arise from ECHR. Although what the court of committal does by discharging a fugitive to whom one of the mandatory grounds of refusal applies helps to avoid the UK breaching Article 3 ECHR by returning the fugitive to a place where he would be treated inhumanly, it is clear that in terms of procedure ECHR has nothing to say about the hearing in the court of committal. In *Kirkwood v United Kingdom*⁴³², the applicant was the subject of an extradition request from the USA. He was committed for return by the court of committal and ordered to be returned by the Secretary of State. He argued that since he had not been permitted to cross examine witnesses against him at the extradition hearing, there had been a breach of Article 6. The Commission held that committal proceedings do not form part of or constitute the determination of a criminal charge within the meaning of Article 6 and that this aspect of his complaint was incompetent *ratione materiae*.

The hearing in the court of committal is governed primarily by section 9 of the 1989 Act. By section 9(3), the court is to have the like powers as if the proceedings were proceedings in respect of a summary offence alleged to have been committed by the fugitive (in Scotland). And by section 9(8), where the court of committal is satisfied that the offence to which the request relates is an extradition crime and that the evidence is sufficient to make a case requiring an answer (except where Order in Council otherwise provides), it must, unless his

⁴³¹ See the consideration of *Stoche v Germany* at 138 below.

⁴³² 37 DR 158 (1984).

committal is prohibited by any other provision of the Act, commit him to await the Secretary of State's decision as to his return.

The issues which arise out of this are, first, what is an extradition crime, secondly, the circumstances in which there must be evidence sufficient to make a case to answer and, thirdly, the circumstances in which committal is prohibited by other provisions of the Act.

Extradition crime

"Extradition crime" is defined by section 2, as regards those cases in which the Scottish courts have jurisdiction, according to the eliminative method. Put shortly, the offence must be one punishable in both the requesting State and the UK with imprisonment for 12 months or by any greater punishment. This is, of course, the approach which is taken by Article 2(1) ECE and also by the Commonwealth Scheme (though the threshold there is two years⁴³³) but the legislative history does not support the conclusion that the eliminative method was adopted so as to make it possible to accede to ECE and comply with the Scheme. The 1982 Working Party examined the alternative methods of defining extradition crime for their own merits and concluded that the eliminative method would represent an improvement⁴³⁴. Its consideration was informed by the knowledge that ECE uses the eliminative method but the fact that its adoption would help to make accession to ECE possible was not something which the Working Party took into account. The furthest they went was to note at a late stage in their Report that some of the changes which they proposed would in fact make accession "less difficult"⁴³⁵. The 1985 Green Paper followed that approach⁴³⁶. The Commonwealth Scheme was, it will be recalled, amended so as to use the eliminative approach in the knowledge that the UK had proposed to legislate to that effect⁴³⁷. It would therefore be incorrect to see the use of the eliminative approach as an example of UK law

⁴³³ Article 2(2).

⁴³⁴ Paras 3.3 – 3.8.

⁴³⁵ Para 16.5.

⁴³⁶ Paras 4.1 – 4.7.

⁴³⁷ See 98 above.

being amended in the light of any particular treaty.

We have mentioned the *Pinochet* case above⁴³⁸. One of the key issues in that case was the question whether the double criminality rule applies as at the date of the offence or as at the date of the extradition request⁴³⁹. So far as relevant, the facts were that Pinochet was the former head of State of Chile and his extradition was sought by Spain in connection with a series of offences, alleged to have been committed between 11 September 1973 and 31 December 1992. Certain of the offences were extraterritorial offences of torture. Torture committed extraterritorially was not a crime under UK law until 29 September 1988, when section 134 of the Criminal Justice Act 1988 entered into force⁴⁴⁰. On the principle of double criminality, the leading speech was that of Lord Browne-Wilkinson. Lord Hope of Craighead adopted Lord Browne-Wilkinson's reasoning and then applied it to the facts of the *Pinochet* case itself.

Lord Browne-Wilkinson reasoned that the 1989 Act regulates at least 3 types of extradition. The first is extradition to a Commonwealth country and the second is extradition under ECE. The third is extradition in cases in which there is an Order in Council in force under the 1870 Act, as to which Schedule 1 to the 1989 Act provides the procedural regime. This analysis was correct, though it might have been added that the Act also regulated *ad hoc* extradition under special extradition arrangements.

Only Schedule 1 contains a clear indication of the date which is relevant for double criminality. Lord Browne-Wilkinson proceeded to use the law in relation to this third class of case as a tool for the interpretation of the law relating

⁴³⁸ See 110.

⁴³⁹ The case is also of significance for the extent to which a former head of state has immunity from prosecution, for the ambit of the offence of torture and for the responsibilities of a judge who finds himself dealing with a case in which an organisation in which he has an interest appears as *amicus curiae*. The temptation to review those matters is resisted here.

⁴⁴⁰ That provision was passed to implement the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984. In *Pinochet* Lord Millet expressed the view that the systematic use of torture on a large scale and as an instrument of state policy had become an international crime of universal jurisdiction by 1973; accordingly, since customary international law is part of English common law, torture committed extraterritorially was a crime

on the point at issue. As we have seen⁴⁴¹, the extradition provisions enacted first in the Criminal Justice Act 1988 and then consolidated in the main body of the 1989 Act represented a deliberate departure from significant aspects of extradition law as it stood under the 1870 Act. The means of identifying extradition crimes was one aspect which changed and the provisions of Schedule 1 as to the identification of such crimes are materially different from those which apply in the body of the Act. That being so, in reasoning by analogy between the Schedule and the body of the Act itself, one should proceed with considerable caution. Lord Browne-Wilkinson's comment that it would be "extraordinary" if the Act required criminality under English law to be shown at one date for one form of extradition and at another date for another put the matter too high. It would simply be undesirable; but the extradition regimes under the body of the Act and its Schedule are sufficiently different to make it perfectly possible that different rules might apply as to operative date. As to the silence of the *travaux* and the government papers, that indicates no more than that the point was not actually considered. What Lord Browne-Wilkinson did, in effect, was to construe legislation which was framed in light of ECE and the Commonwealth Scheme in light of the UK's thoroughly anglocentric pre-1989 law and practice.

The case to be made

In terms of section 9(8) the court of committal must be satisfied that the evidence "would be sufficient to make a case requiring answer", "unless an Order in Council giving effect to general extradition arrangements under which the request was made otherwise provides". Section 9(4) provides that where there is an extradition request from a foreign state and such an Order in Council is in force in relation to that state there is no need to furnish the court of committal with evidence sufficient to warrant the trial of the fugitive. Paragraph 3 of the European Convention on Extradition Order 1990⁴⁴² applies that exception to States Parties to ECE.

⁴⁴¹See 78 above.

⁴⁴²SI 1990 No 1507.

In introducing the Commons Second Reading debate on the Bill which became the 1988 Act, the Home Secretary recognised that the *prima facie* case requirement was the "single most significant impediment to extradition from this country"⁴⁴³ and the discarding of that requirement was both the most significant and the most controversial⁴⁴⁴ step taken in the 1988 Act. The issue here is how far the discarding of the requirement represents the influence of international law on municipal criminal procedure law.

If it is accepted (as it must be) that extradition is, in part at least, a matter for international law, and if it is also accepted that extradition arrangements are made "to serve the purpose of bringing to justice those who are guilty of grave crimes committed in either of the contracting states"⁴⁴⁵, it follows that any change in municipal law so as to render such international arrangements more effective may be characterised as international law influencing municipal law. Such an assertion is, however, too vague to be of much value. What is of much greater interest is the question whether the discarding of the *prima facie* case requirement took place primarily in order to permit the UK to accede to ECE.

The evidence seems to indicate that accession to ECE was not the Government's primary motivation. In his speech on Commons Second Reading⁴⁴⁶, the Home Secretary did not mention ECE at all. Rather, in defending the change, he stressed the difficulty which European countries of the civilian tradition found in securing extradition from the UK and the difficulties which that caused the UK in negotiating agreements with those countries for the return of fugitives from British justice. In the House of Lords the Home Office Minister had taken a similar line⁴⁴⁷.

One should, of course, remember that Government ministers are not

⁴⁴³ Mr Douglas Hurd, HC Debs vol 125, col 681 (18 January 1988).

⁴⁴⁴ See for example the speech of Mr Alex Carlisle in Commons Second Reading (HC Debs vol 125, col 682 (18 January 1988)) and Ian Leigh's assessment in "Criminal Justice Act 1988" *Current Law Statutes Annotated* 1988 33-27.

⁴⁴⁵ *Government of Belgium v Postlethwaite* [1987] 2 All ER 985 at 991 *per* Lord Bridge.

⁴⁴⁶ HC Debs vol 125, cols 681-684 (18 January 1988).

⁴⁴⁷ The Earl of Caithness, HL Debs, vol 489 (No 1369) cols 44-45 (20 October 1987).

necessarily entirely frank with Parliament about their motives. Presentational considerations argue for stress to be laid on those arguments most likely to persuade waverers. A blunt assertion that the UK had decided to ratify ECE and depart from a cherished principle of extradition law in order to "come into line with Europe" would have been politically dangerous. An argument which appealed to law and order concerns was more likely to attract the support of Government back benchers and to be difficult for the Opposition to dispute⁴⁴⁸. It is clear from remarks made by the Home Office Minister in the House of Lords that there was indeed a desire to accede to ECE and that failure to do so was perceived as hindering the UK's wider efforts to address international crime⁴⁴⁹.

These ministerial pronouncements have also to be seen, however, against the background of the 1982 Working Party report which⁴⁵⁰ concluded that the *prima facie* case requirement as it then operated put "unnecessarily stringent demands on requesting states". The balance of opinion in the Working Party was in favour of discarding the requirement. Just as was the case in relation to the adoption of the eliminative method of defining extradition crimes, in describing the case for discarding the requirement, the Working Party made no reference at all to ECE⁴⁵¹. Presentational considerations are likely to have carried much less weight with that Working Party than with those who drafted the Home Secretary's Second Reading speech. Again, the Green Paper, *Extradition*, which did not state policy but sought views, focused consideration of the requirement on the difficulties which it caused in terms of law enforcement rather than on its effect on accession to ECE⁴⁵². What ministers said in Parliament was entirely consistent with these approaches. The weight of evidence seems, then, to favour the

⁴⁴⁸ It also enabled the Government to sidestep Lord Irvine of Lairg's point that the UK could follow Israel's example (European Convention on Extradition Order 1990 (SI 1990 No 1507) Schedule 3 Part 10) of acceding to ECE under reservation insisting on the *prima facie* case requirement (HL Debs Vol 488 (No 1367) col 951 (14 July 1987)).

⁴⁴⁹ The Earl of Caithness, HL Debs, vol 489 (No 1369) col 22 (20 October 1987).

⁴⁵⁰ *Op cit*, para 4.14.

⁴⁵¹ *Op cit*, paras 4.6-4.8.

⁴⁵² *Op cit*, paras 2.5-2.13. ECE was mentioned only in the context of an option of discarding the requirement only in respect of parties to ECE.

conclusion that the principal motive for discarding the requirement was to make extradition easier. The possibility of accession to ECE which this would open up seems to have been seen as attractive, both because it would avoid the need to negotiate new treaties⁴⁵³ and because it would remove an obstacle to achieving agreement on other international crime issues⁴⁵⁴; but accession for accession's sake does not seem to have been the main impetus for change.

Upon this analysis we should conclude that the discarding of the *prima facie* case requirement took place because of concerns about the relative ineffectiveness of UK extradition law and the difficulties which that caused for the Government's wider policy of "set[ting] the pace in international agreements and action to grip international crime"⁴⁵⁵. It did not represent action taken with the primary purpose of putting UK law into a state which would permit accession to ECE. It is an example of international law having an influence in municipal criminal law only in the broad general sense that any legislative change designed to make extradition easier represents such an influence. It does not represent the influence of a particular treaty in municipal law.

There is a further issue in relation to the requirement, in Commonwealth cases, that the court of committal should be satisfied that there is evidence "sufficient to make a case requiring an answer...if the proceedings were the summary trial of an information". This form of words was introduced by the Criminal Justice and Public Order Act 1994 and it is depressing that no-one seems to have noticed at that time that there is, in Scots law, no such thing as the "summary trial of an information". By ignoring what the Act says in favour of what it should have said the procedure can be made to work. What it evidently means is that the evidence must be such as to satisfy the test applied on a submission of "no case to answer" made in terms of section 160 of the Criminal Procedure (Scotland) Act 1995. Or perhaps not quite, because that section provides for such a submission to be repelled even if there is insufficient evidence

⁴⁵³ 1982 Working Group Report, para 16.7.

⁴⁵⁴ The Earl of Caithness, *loc cit.*

to prove the principal charge, provided there is sufficient to prove any alternative offence of which the person could be convicted⁴⁵⁶. Given the rule of specialty-which is not, of course, really a matter for the court of committal at all because it is expressed in section 6(4) of the 1989 Act in terms which relate to the law of the requesting state-what section 9(8) must mean is that the evidence must be sufficient to satisfy the "no case to answer" test as regards the particular crime for which extradition is sought and as regards that crime only.

Section 35(5) of the 1989 Act defines evidence which would make a case requiring an answer as evidence which would warrant or justify the committal for trial of an accused person. In *R v Brixton Prison Governor ex p Schtraks*⁴⁵⁷ Lord Reid said that the evidence must be such that, if it "stood alone at trial, a reasonable jury, properly directed, could accept it and find a verdict of guilty"⁴⁵⁸. The debate in English law has always been about the admissibility of various forms of evidence⁴⁵⁹. In *R v Governor of Pentonville Prison ex p Kirby*⁴⁶⁰, for example, a failure to comply with the best evidence rule led to the quashing of the committal. More recently, in *R v Governor of Brixton Prison ex p Gross*⁴⁶¹ the Divisional Court allowed an application for *habeas corpus* where (on a request from the USA, dealt with under Schedule 1) the magistrate had refused to allow the fugitive to give evidence. But in Scotland there is a still more fundamental consideration. If the procedure is to be that appropriate to summary proceedings alleged to have been committed by the fugitive, and if the test relates to the sufficiency of evidence as if on a submission of no case to answer, it follows that the search must be for corroboration. As the Lord Justice-General (Rodger) said in

⁴⁵⁵ Mr Douglas Hurd, HC Debs vol 125, col 684 (18 January 1988).

⁴⁵⁶ Section 160(1)(b).

⁴⁵⁷ [1964] AC 556, 580.

⁴⁵⁸ Though it is clear that English law understands this to include some "weighing" of the evidence (*R v Governor of Pentonville Prison ex p Osman* [1990] 1 WLR 277) and this process is, in Scots law, excluded by *Williamson v Wither* 1981 SCCR 214.

⁴⁵⁹ See Michael Forde, *The Law of Extradition in the United Kingdom*, 69-73; Joyce M Ferley, *op cit* para 5.10-5.11.2.

⁴⁶⁰ [1979] 2 All ER 1094.

⁴⁶¹ [1999] QB 538.

*Smith v Lees*⁴⁶²: "...the doctrine of corroboration has always been an important part of our law...The safeguard against wrongful conviction which the requirement of corroboration affords is needed as much today as ever it was". That corroboration is required in order to provide a sufficiency of evidence in any Scottish prosecution⁴⁶³ is undeniable. The effect must be that a Commonwealth country seeking the extradition of a person found in Scotland must make a fully corroborated case. Such a requirement is alien to English law and hence alien to those systems based on English law.

This is an absurd state of affairs. Having discarded the requirement for countries of the civilian tradition to meet evidential tests which are alien to them, Parliament has, no doubt unwittingly, brought about a state of affairs in which Commonwealth countries seeking extradition from Scotland have to meet an evidential test which is alien to them.

Circumstances precluding return

We turn now to consider the circumstances in which return is precluded by provisions of the 1989 Act other than section 9 and how far those other provisions are influenced by international law.

So far as the court of committal is concerned, those other provisions are to be found in section 6. By that section, a person shall not be returned if it appears to "an appropriate authority" (at this stage, the court of committal) that the offence is a political one, that the offence is one under military law which is not also an offence under the general criminal law, that the request for his return is in fact made for the purpose of prosecuting or punishing him on account of his race, religion, nationality or political opinions or that he might, if returned, be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of one of those things ("non refolement")⁴⁶⁴. In a case where the fugitive has been convicted in his absence in the foreign state he must not be returned if it

⁴⁶² 1997 SCCR 139, 142.

⁴⁶³ There are a few very minor statutory exceptions.

⁴⁶⁴ Section 6(1).

appears that it would not be in the interests of justice to return him⁴⁶⁵. He must not be returned if it appears that, if charged with the relevant offence in the UK he would have been entitled to be discharged under “any rule of law relating to previous acquittal or conviction” (“non bis in idem”)⁴⁶⁶. Nor must he be returned unless provision is made in the relevant law or extradition arrangement for the respecting of the rule of specialty⁴⁶⁷.

All of these restrictions on return occur very commonly in extradition treaties. Every one of them except for the restriction in the case of a conviction in absence is to be found in ECE, for example⁴⁶⁸ and they are, without exception, to be found in article 3 of the UN Model Treaty on Extradition⁴⁶⁹. But this is not to say that they have a treaty source. It will be recalled that section 4(2) of the 1989 Act, like its 1870 Act predecessor, prevents the making of an Order in Council to give effect to extradition arrangements unless the arrangements are in conformity with the provisions of the Act “and in particular with the restrictions on return”⁴⁷⁰. The political offence exception and the rule of specialty were provided for in section 3 of the 1870 Act. As has already been established, the UK was at that time making only bilateral extradition treaties, and those within the framework provided by the 1870 Act. *Non bis in idem*, whilst not explicitly provided for in the 1870 Act, was held in *Atkinson v United States Government*⁴⁷¹ to be a plea available to the fugitive arising out of the magistrate’s ordinary powers in dealing with a committal hearing. It cannot, therefore, be said that the appearance of these three grounds of refusal in the 1989 Act owes anything to international law.

The military offence exception did not exist in its own right in UK law before the passing of the 1989 Act. However, it will be recalled that the definition of extradition crime had, until then, been by the enumerative approach. Military

⁴⁶⁵ Section 6(2).

⁴⁶⁶ Section 6(3).

⁴⁶⁷ Section 6(4).

⁴⁶⁸ The political offence exception is in Article 3(1); military offences in article 4; non refolement in article 3(2); non bis in idem in article 9; and the rule of specialty in article 14.

⁴⁶⁹ General Assembly Resolution 45/116 of 14 December 1990.

⁴⁷⁰ Section 4(2)(b).

offences which were not also crimes under the general criminal law did not appear in the list of extradition crimes and so it was unnecessary to provide for a free standing restriction on return. The enactment of such a restriction reflects and goes beyond Article 4 ECE, which excluded such offences from the ambit of the Convention but does not preclude extradition for such offences. Article 11 of the Commonwealth Scheme does preclude extradition for military offences. Assuming, however, that the UK shared the widespread disinclination to extradite for such offences⁴⁷², specific provision was required once the eliminative method was used to define extradition crime.

The origins of Article 4 ECE are not disclosed in the Explanatory Report; but it does appear that France was precluding extradition for military offences at least as early as 1927⁴⁷³. It may, therefore, be that Article 4 reflects the municipal policy of certain States involved in the negotiation of ECE. At least it may be said that there is a very large municipal law and policy component in the existence of the military offence exception. It by no means represents the simple translation of international law into municipal law.

The principle of non-refoulment did arise first in international law, most influentially in the UN Convention Relating to the Status of Refugees 1951⁴⁷⁴ but also in Article 3(2) ECE. It was (and is) a feature of the Commonwealth Rendition Scheme⁴⁷⁵ and that led to its recognition in UK law in section 4(1)(c) of the Fugitive Offenders Act 1967, whence it has found its way into the 1989 Act. It represents, therefore, an example of a principle developed in international instruments which has influenced the content of UK municipal extradition law. As such, it is in a definite minority.

The hearing in the court of committal

Although some of the UK's former bilateral extradition treaties had a good deal to

⁴⁷¹ [1971] AC 197.

⁴⁷² See Gilbert, *Aspects of Extradition Law*, 101.

⁴⁷³ Gilbert, *loc cit.*

⁴⁷⁴ See generally Gilbert, *Aspects of Extradition Law*, 232 *et seq.*

⁴⁷⁵ Article 10(2)(a).

say about the procedure to be followed in the municipal courts⁴⁷⁶, ECE has little to say directly about the hearing. It sets out the criteria which States Parties must or may apply to extradition and the obligations which the States Parties undertake but the way in which any State Party goes about determining how those criteria apply in a given case is left to its internal arrangements. Indeed, Article 22 ECE provides explicitly that “the procedure with regard to extradition and provisional arrest shall be governed solely by the law of the requested party”. Amongst the States Parties to ECE, whilst it may be said that there will be a court hearing in any extradition case, the nature and function of that hearing and the stage at which it takes place varies quite widely⁴⁷⁷. It follows from the nature of the Commonwealth Scheme that it does prescribe procedure in outline. We have, however, seen above that there is substantial interpenetration between UK law and the Scheme and it would be incorrect to say that the 1989 Act contains the procedure it does simply in order to comply with the Scheme.

If the court of committal is satisfied that the offence for which extradition is requested is an extradition crime, that there is a *prima facie* case (where that is required) and that none of the section 6 restrictions on return apply, it has no discretion. Section 9(8) provides that it shall commit the fugitive for return. It has no power to apply general international extradition law and, in particular, no power to examine the treaty and compliance with it by the requesting state. Such right as the judiciary has to examine the treaty arises only obliquely, in the context of judicial review of the Secretary of State's decision to order return. The position of the court of committal under the 1870 Act was put most succinctly by Lord Ackner in *R v Governor of Pentonville Prison, ex p Sinclair*⁴⁷⁸, when he invited his brethren to agree with him (as they did) that: “...the magistrate has no jurisdiction to decide either whether there has been an abuse of the process of the

⁴⁷⁶ See, for example, Article II of the UK's 1902 Treaty with Belgium (reproduced in Order in Council Directing that the Extradition Act shall apply in the case of Belgium SI 1902 No 208), now superceded as a result of Belgium's accession to ECE.

⁴⁷⁷ See International Criminal Policy Division, Home Office, *Extradition: A Guide to Procedures of EC Member States*, 1993.

⁴⁷⁸ [1991] 2 AC 64 at 91.

court, or whether the requirements of the treaty have been satisfied, his powers being limited to those in sections 3(1), 8, 9 and 10". Jones maintains that the 1989 Act contains "no indication" that the court of committal is charged with duties as regards the content of the treaties and maintains that cases such as *ex p Sinclair* still represent the law⁴⁷⁹.

Jones' argument and the cases upon which it is founded do not explain how the prohibition on the Court of Committal examining the treaty is to be reconciled with what Lord Widgery CJ said in *ex p Sotiriadis*⁴⁸⁰ and what Lord Diplock said in *re Nielsen*⁴⁸¹. In *Sotiriadis* Lord Widgery said that it was clear from section 5 of the 1870 Act that where there was a variation between the terms of the Act and those of the treaty the treaty should prevail so as to afford to the fugitive any advantages conferred by the treaty but not by the Act. In *Nielsen* Lord Diplock said that the jurisdiction conferred on the magistrate by the Act is the widest that he may lawfully exercise in relation to extradition but that it may be restricted as regards a given country by the terms of the treaty with that country. This being so, it is, of course, wasteful and a nonsense to prevent the court of committal from looking at the treaty at all. It would be better to understand what Lord Ackner said in *Sinclair* narrowly, so that it is not for the court of committal to determine whether the requirements of the treaty have been

⁴⁷⁹ *Jones on Extradition*, 104. Jones bases his analysis on a series of cases which were concerned chiefly with the undesirability of the court of committal hearing evidence of the content of foreign law as regards the dual criminality requirement. Those cases are *Re Nielsen* (1984) 79 Cr App R 1 (Divisional Court-the case later went to the House of Lords, where it is reported at [1984] 2 WLR 737, though the treaty point did not arise); *R v Bradshar* February 28, 1984 (unreported) (CO/310/83); *Government of the United States of America v McCaffery* (*supra*); *ex p Jennings* (*supra*); *R v Governor of Ashford Remand Centre ex p Postlethwaite* [1988] AC 924; *R v Governor of Pentonville Prison ex p Herbage (No 3)* (1987) 84 Cr App R 149, DC; *Re Naghdi* [1990] 1 WLR 317; *ex p Sinclair* (*supra*). The prohibition on examination of the treaty arises because it is *a fortiori* of the reasoning applied to examination of foreign law. This is a pity, because whilst foreign law is a question of fact, upon which, if courts of committal were to consider it, they would require evidence (and did so, over several days in *Nielsen*), treaties incorporated into UK law by Order in Council and are therefore directly available for the court's consideration as matters of law. The particular mischief which the appellate courts were anxious to address, namely the inordinate amount of time spent on such inquiries, did not therefore arise in connection with examination of treaties.

⁴⁸⁰ [1974] 2 WLR 253, 255.

⁴⁸¹ [1984] 2 WLR 737, 741.

satisfied, leaving it open to the court of committal to consider the treaty in relation to any restriction it makes in the jurisdiction to commit for return. The treaty will, of course, be incorporated by Order in Council and so imbued with the character of statute⁴⁸²; but the same cannot be said of the Commonwealth Rendition Scheme.

What is clear is that, despite the incorporation of extradition treaties into Orders in Council (and hence UK law), there is some limitation on treaties operating at the judicial stage of extradition procedure and on the ability of the fugitive to invoke treaty provisions in the representations which he makes against being found liable to return. If this analysis is wrong and Jones' approach does not require the qualification suggested, the effect of the treaty in the court of committal is still more limited.

Appeals

The second stage in the judicial phase of extradition is the appeal. Where the court refuses to commit for return, the requesting state has a right of appeal to the High Court of Justiciary by stated case, on a point of law⁴⁸³. Review at the instance of the person committed for return is, however, on a different basis.

Section 11 requires a court which commits a person for return to inform him of his right to make an application for habeas corpus⁴⁸⁴. The section does not create such a right. It merely makes provision for what is to happen if it is exercised. Along with its existing jurisdiction on such applications, the (English) High Court may order the discharge of the fugitive if it considers, on the basis of fresh evidence if need be, that return would be unjust or oppressive by reason of the trivial nature of the crime, the passage of time since it is alleged to have been committed or because the accusation is not made in good faith in the interests of justice⁴⁸⁵. These are matters which the court of committal cannot take into account but which may be of considerable importance in avoiding a *Soering* type situation.

⁴⁸² See 21 above.

⁴⁸³ 1989 Act s10.

⁴⁸⁴ 1989 Act s11(1).

⁴⁸⁵ 1989 Act s11(3).

In the application of section 11 to Scotland, references to an application for habeas corpus are to be construed as references to an application for review of the order of committal and references to the High Court are to be construed as references to the High Court of Justiciary⁴⁸⁶. It is worth comment here that this makes the assumption that such a right of review by the High Court of Justiciary exists. The Act does not create such a right. In the event, the fugitive in *Triplis, Petitioner*⁴⁸⁷, the only case in which the procedure has so far been pursued, had to use the *nobile officium*. That is a residual remedy, intended for circumstances which are "both extraordinary and unforeseen"⁴⁸⁸ and where the absence of a right of appeal is the result of "an omission to provide what is necessary as a means of carrying out a statutory intention"⁴⁸⁹. It is not satisfactory that the right of an accused to review by a higher court depends on a remedy for unforeseen circumstances, especially where the lacuna in the 1870 Act had been pointed out by the High Court in *Wan Ping Nam*⁴⁹⁰.

Triplis was a Greek national who had been detained in Greece in 1984 in connection with a series of break-ins and thefts at business premises. He had been released pending trial on a financial security and with a condition that he should report to a police station twice a month. Shortly thereafter, he left Greece and travelled to Glasgow, where he married a British national. His whereabouts seem to have been unknown to the Greek authorities until 1992, when he wrote to them and applied to renew his passport. In 1994, Greece requested his arrest and extradition and in October 1996 the Secretary of State for Scotland granted authority to proceed. Triplis was arrested in November 1996 and placed before Edinburgh Sheriff Court, sitting as a court of committal. After due procedure he was, in January 1997, committed for return.

The argument made on his behalf in the High Court was that it would be

⁴⁸⁶ 1989 Act s11(6).

⁴⁸⁷ 1997 SCCR 398.

⁴⁸⁸ See GH Gordon, *Renton and Brown's Criminal Procedure*, 691.

⁴⁸⁹ *Ibid.*

⁴⁹⁰ See 37 above.

unjust or oppressive to return him, first because of the trivial nature of the offences and secondly by reason of the passage of time.

The High Court noted that under Greek law the charges were capable of being punished with a minimum of 5 and a maximum of 10 years' imprisonment and that, especially if taken together, they were of a sort which were capable of attracting a prison sentence in Scotland. That possibility is, of course, essential to their qualification as extradition crimes; but the High Court went further and, looking at the particular offences alleged against Triplis, said that "whilst the charges may not be among the most serious which can be envisaged, they can on no view be described as trivial"⁴⁹¹. The first leg of the argument that it would be unjust or oppressive to return Triplis therefore failed.

The argument as to delay turned on the fact that Triplis had been detained in Greece in 1984 and released on conditions. The High Court took the view that his departure from Greece in 1984 necessarily involved breach of the conditions. He could, the High Court said, "properly be regarded as having fled the country"⁴⁹². The Court followed Lord Diplock's reasoning, in *Kakis v Government of Cyprus*⁴⁹³, that delay brought about by the accused fleeing the country, concealing his whereabouts or evading arrest could not be relied upon. Such an approach is consistent with the attitude of the High Court in *Watson v HM Advocate*⁴⁹⁴ in which the Crown obtained an extension to the ordinary time limits for bringing an indictment case to trial when it was learned that the accused had decamped from his domicile of citation, possibly to the Republic of Ireland. It is also consistent with the attitude of ECtHR to the Article 6(1) ECHR guarantee of trial within a reasonable time⁴⁹⁵.

Because Triplis' whereabouts were unknown to Greece until he applied for a new passport in 1992, the period between 1984 and then fell to be left out of

⁴⁹¹ At 401E-F.

⁴⁹² At 403D-E.

⁴⁹³ [1978] 1 WLR 779.

⁴⁹⁴ 1983 SCCR 115.

⁴⁹⁵ *Girolami v Italy* A 196-E (1991).

account. The delay from 1992 to October 1996 was said by the High Court to be explicable in part by the need for the extradition request to be considered properly. This, with respect to the High Court, seems somewhat feeble. It is suggested that if the key issue had been delay in absolute terms, some more substantial explanation would have been required. However, the critical issue, from the point of view of the High Court was whether the delay had made it impossible for *Triplis* to have a fair trial. Since it was not suggested on his behalf that such a consequence did arise, the prayer of his petition was refused.

Although the High Court did not analyse section 11, the approach which they took is consistent with the fact that the ultimate test is whether return would have been “unjust” or “oppressive”. The test is not whether there had been an inadequately explained delay *simpliciter*. It seems likely (though they did not say so) that the High Court had in mind municipal jurisprudence on *mora* as a plea in bar of trial. In *McFadyen v Annan*⁴⁹⁶, a full bench case, Lord Justice-Clerk Ross said “the real question which the Court has to consider in all cases where delay is alleged is whether the delay has prejudiced the prospects of a fair trial...cases where such a plea in bar of trial will be upheld will be rare and exceptional”. A similar approach had been taken in *Higginson v Secretary of State for Scotland and HM Advocate*⁴⁹⁷ when the question of lapse of time arose under the Fugitive Offenders Act 1967 section 8(3)(b). That Act, as we have seen⁴⁹⁸, represented a stage in rendition arrangements with the Commonwealth. The Scottish courts had jurisdiction under the Act, though cases were rare.

In *Higginson*, the Lord Justice-General (Emslie) said that, as to the crime in question (rape), neither Scotland nor Canada (the requesting jurisdiction) had a time-bar. The delay had been for 3 years and the Lord Justice-General said that “in the case of a person accused of rape in Scotland it would be no answer to arrest for trial in Scotland just over 3 years later, that in the interval, the accused had settled and married in England and in the light of this consideration we find it

⁴⁹⁶ 1992 SCCR 186.

⁴⁹⁷ 1973 SLT (Notes) 35.

impossible to discover any injustice or oppression in returning the petitioner to Canada". He went on to say that, although the passage of time might have dimmed the recollection of many witnesses, "this is a factor common to many cases and, *where it is not suggested that the evidence of any particular defence witness is in question*, the impairment of recollection is unlikely to be to the prejudice of the accused"⁴⁹⁹. The petition for review of the order for committal for return therefore failed. With this, we may contrast *Re Mohammed Anwar*⁵⁰⁰ in which the Divisional Court held that the passage of time would have rendered it unfair to return the fugitive to Denmark. This was because 14 years had passed since the commission of the crime and witnesses' memories would have faded. Schiemann, J pointed out that this was broadly in line with the approach taken to English cases. The test applied was, therefore, a domestic law one, just as it was in *Higginson*.

What the Divisional Court failed to consider, however, was whether the fairness of the trial procedure should not be a question primarily for the requesting State. Section 11 of the 1989 Act, after all, requires the court to consider whether the returning of the fugitive would be "unjust" or "oppressive"-not to pre-empt any decision which the courts of the requesting state might take as to a plea in bar of trial. It should be recalled that the European Commission of Human Rights has been very slow to hold that trial conditions in a requesting state could give rise to a breach of ECHR on the part of the requested state. In *Kozlov v Finland*⁵⁰¹, the applicant had been called up for compulsory military service in the USSR, of which country he was a national and resident. After a fortnight he told the Soviet authorities that he could not continue his military service because it caused him moral and ethical problems. He was thereupon incarcerated in a military hospital and injected with "sulphuric substances" which damaged his sight, hearing and speech. He was then certified mentally ill, as a consequence of which he was

⁴⁹⁸ Page 78.

⁴⁹⁹ Emphasis added.

⁵⁰⁰ Unreported, Divisional Court, 4 March 1994 (CO/1055/93).

⁵⁰¹ 69 DR 321 (1991).

denied the opportunities to continue his studies, to work, to choose his domicile, to obtain a passport or driving licence, to marry and found a family and to vote. He hijacked a civilian airliner to Helsinki and requested asylum. In Finland proceedings were commenced against him for the hijacking but the USSR then requested his extradition for that offence, producing a warrant issued by the KGB. He was extradited to the USSR, where he was examined and found to have become "mentally sound". He was eventually placed on trial under conditions which, the Finnish Government conceded, might not have been "in full harmony with the requirements of Article 6 of the Convention". Since he was caged during the trial and prevented from communicating with his lawyer, one might think that the concession was something of an understatement. Nevertheless, the European Commission of Human Rights decided that the Soviet trial procedure could not be said to be such a flagrant denial of the right to a fair trial as to found a finding of breach of Article 6 by Finland in surrendering him. The application was dismissed as inadmissible.

In both *Higginson* and (more recently) *Triplis*, then, the High Court, in determining whether it would be unjust or oppressive to return the accused, had regard both to the seriousness of the offence in Scots law and to the domestic test for *mora* of prejudice in the conduct of the defence⁵⁰².

The executive phase

We can deal with the executive phase quite briefly. Where a person is committed for return and not discharged by the High Court the Secretary of State may by warrant order him to be returned unless his return is prohibited by the Act⁵⁰³. The general discretion which this gives to the Secretary of State is circumscribed by section 9(2), which provides that the Secretary of State shall not make an order if it appears to him that, by reason of the trivial nature of the offence, the passage of time since it was committed or because the accusation against him is not made in

⁵⁰² It is tempting to see a parallel with Article 6(1) ECHR and the guarantee of trial within a reasonable time; as to that, it is understood that EComHR operated a rule of thumb that no delay of less than 3 years would be considered. However, it is clear that Article 6 does not apply to extradition procedure (*Soering*) and the basis of comparison would not, therefore, be satisfactory.

good faith in the interests of justice it would be unjust or oppressive to return him. These considerations are, of course, the same as those which are to guide the High Court. The same section goes on to permit the Secretary of State to make no order where the fugitive could be sentenced to death in the requesting state but could not have been so sentenced had he been prosecuted in the UK. The death penalty consideration in section 9(2)(b) addresses precisely the situation in *Soering*.

It seems evident from this that it is only at the stage of the Secretary of State's consideration that the Article 3 ECHR problem may be addressed. It cannot be brought within any of the restrictions on return set out in section 6. Nor can it be brought within the grounds for ordering discharge on review by the High Court.

The other area which requires some attention is that of judicial review of the Secretary of State's decision. One might have expected to find a useful comparator with *Fininvest*, in which the Secretary of State was expected to have regard to the treaty. The area is, however, less fruitful than one might have hoped. For reasons of English procedural law⁵⁰⁴, *habeas corpus* has been preferred even after committal for return. And, whichever procedural route has been followed, it is clear that the cases have turned on the statute rather than on the treaties⁵⁰⁵.

Ireland

There are some differences in the procedure in Irish cases. The writer has analysed the legislation in detail elsewhere⁵⁰⁶ and that analysis need not be repeated exhaustively here. Some comment is, however, appropriate in order to illustrate the point that the arrangements for the return of fugitives to Ireland depend entirely on municipal law.

Under the Backing of Warrants (Republic of Ireland) Act 1965, a warrant for a returnable offence, having been issued by the judicial authority in Ireland, is transmitted to the United Kingdom, not through any central authority but directly

⁵⁰³ Section 12(1).

⁵⁰⁴ See Jones, *op cit*, 234.

⁵⁰⁵ See Jones, *op cit*, chapter 10.

to the relevant police force. Thereafter, the procedure contemplates that "an application for the endorsement of the warrant is made to a justice of the peace in the United Kingdom by a constable who produces the warrant and states on oath that he has reason to believe the person named or described therein to be within the area for which the justice acts or on his way to the United Kingdom"⁵⁰⁷. By section 10(3), in Scotland, "justice of the peace" is to include a sheriff and a magistrate.

The application having been made, the sheriff or magistrate (assuming the provisions of the Act are complied with) has no discretion. In terms of section 1 of the Act he *must* endorse the warrant "in the prescribed form" for execution within the part of the United Kingdom comprising the area for which he acts. The absence of discretion was confirmed by the Divisional Court in *R v Metropolitan Police Commissioner, ex p Arkins*⁵⁰⁸. Although the point has not been tested, it appears that this rule must limit the reviewability of such warrants to questions relating to the satisfaction of the formal requirements of the statute⁵⁰⁹.

Provisional arrest is contemplated by section 4 of the Act. A justice of the peace in the United Kingdom, on the application of a constable may⁵¹⁰ issue a warrant in prescribed form if the constable states three things on oath. The first of these is that he has reason to believe that a warrant has been issued by "a judicial authority in the Republic for the arrest of a person accused or convicted of an indictable offence against the laws of the Republic" but that the warrant is not yet in his possession. The second is that he has received a request made on grounds of urgency by a member of the police force of the Republic holding the rank of inspector or above for the issue in the United Kingdom of a warrant for the arrest of that person. The third is that he has reason to believe that person to be within

⁵⁰⁶ Alastair N Brown, "The Backing of Warrants (Republic of Ireland) Act 1965: A Critical Analysis of Some Essential Elements" 1998 SLPQ 52.

⁵⁰⁷ Section 1(1)(b).

⁵⁰⁸ [1966] 1 WLR 1593.

⁵⁰⁹ Contrast the position as regards ordinary extradition, described at 109-110 above.

⁵¹⁰ It is to be noted that this is one of the few places in the Act where the court has any real discretion.

the area for which the justice acts or on his way to the United Kingdom.

The requirement to bring the person arrested before the sheriff as soon as practicable arises from section 4(3), which also provides that if the Irish warrant is produced at that time the court may proceed as if the fugitive had been arrested on that warrant. If the Irish warrant is not so produced, the court may remand the fugitive for not more than seven days. Other than in Scotland, subsection (4) provides that if within that time the warrant is produced the remand determines and the fugitive is to be treated as if he had been arrested "at that time" under that warrant and subsection (5) provides that if it is not produced, he is to be discharged.

Subsection (6) provides that, as respects Scotland, subsections (4) and (5) are not to apply but that if a warrant issued and endorsed "as aforesaid" (presumably, as contemplated in section 1) is not produced within the period of the remand, the fugitive is to be discharged. This provision is curious, first because unlike subsection (4) it does not say what is to happen if a warrant is produced and, secondly, because there is not on the face of subsections (4) and (5) anything which would cause difficulty for Scots law and so it is not obvious why they have been disapplied.

The effect of the arrival of the warrant in England and Wales, where subsection (4) applies, must be to bring into play section 2(1), which requires that a person arrested on an endorsed warrant should be brought before a magistrates' court "so soon as is practicable". Section 4(4) therefore interrupts the period of remand so as to have the fugitive brought before the court for the next stage in procedure. Had this applied to Scotland, it should not have caused a Scottish court any difficulty at all. However, the absence from subsection (6) of an equivalent for subsection (4) seems to make it competent for the fugitive to be left on remand for the full seven days even if the warrant arrives well before they expire.

Once an endorsed warrant is available and the fugitive has been arrested (on that warrant or on a provisional warrant), section 2 of the 1965 Act requires that he should be brought before the court. Reading section 2 under reference to

the application to Scotland in section 10(3), that means the sheriff court. The court before which he is brought is required, subject to the provisions of section 2, to order the fugitive to be delivered to "some convenient point of departure from the United Kingdom" into the custody of a member of the Garda. The administrative discretion of the Secretary of State to surrender or decline to surrender a person found by the courts to be liable to extradition, which is an important feature of extradition legislation in the strict sense⁵¹¹, is thus completely excluded and no discretion is given to the court in its place. The fugitive *must* be surrendered unless it is shown to the satisfaction of the court that the case falls within a specified exception.

The procedure is, then, set out in considerable detail in the 1965 Act and it admits of very little discretion. A procedure is set out in the legislation and, if the case is within that procedure, return of the fugitive will be well nigh automatic.

The fugitive returned to the UK

Most of the 1989 Act is concerned with the position when the UK is the requested state. Sections 18 to 20, however, deal with the position of the person who is returned to the UK as requesting state; but they require little attention. Sections 18 and 19 apply the rule of specialty to domestic criminal law (reflecting, for example, Article 14 ECE⁵¹²) and section 20 requires the restoration of a person who is not tried or who is acquitted. Of more interest, however, is the position of the person who is returned to the UK irregularly and outside the usual treaty framework.

Irregular rendition, if not developed in the USA, has at least been elevated into an art-form there. The most celebrated-or notorious-case is *United States v Alvarez-Machain*⁵¹³, in which the US Supreme Court held that a defendant forcibly abducted from Mexico, a country with which the USA has an extradition treaty and of which he was a national, does not thereby acquire protection against

⁵¹¹ Extradition Act 1989 s12(2). For the reasons for such discretion, see JD McCann, "*United States v Jamieson*..." 162 and J Semmelman, *op cit*, 1129.

⁵¹² In the event of the Third Pillar Convention on extradition entering into force, sections 18 and 19 will require adjustment to take account of the presumed waiving of the rule.

the jurisdiction of the US criminal courts. This decision was criticised by Steinhardt-and he was only one of many-as "a stunning endorsement of lawlessness"⁵¹⁴. Be that as it may, the US Supreme Court was careful to point out that they were deciding only the question of municipal jurisdiction, not the international law question of Mexican territorial integrity, and that they came to their decision notwithstanding the fact that "[r]espondent and his amici may be correct that respondent's abduction was 'shocking' and that it may have been a violation of general international law principles".

It is necessary at this point to return to *Bennett, Petitioner*, the facts of which are given above⁵¹⁵. It was maintained on the petitioner's behalf that a Full Bench ought to be convened to reconsider the law of Scotland as expressed in *Sinclair v HM Advocate*⁵¹⁶, which may be summarised in the maxim *male captus, bene detentus*.

The High Court declined to take the opportunity to reconsider *Sinclair*, though Gane and Nash have interpreted some of what Lord Justice-General Hope had to say as a hint that they might be prepared to do so in some future case⁵¹⁷, a position which the High Court has itself confirmed in *Torres v HM Advocate*⁵¹⁸. In *Bennett*, the High Court held that there had been no illegality in the events which resulted in the petitioner's return to the UK (in other words, that the English Divisional Court had arrived at the wrong result on the facts) and that accordingly the issue did not arise. It should not, however, be assumed that *Sinclair* is necessarily incompatible with the position at which the House of Lords arrived in *ex p Bennett*.

Sinclair was an unsuccessful Bill of Suspension. The accused was wanted

⁵¹³ 112 S Ct 2188 (1992).

⁵¹⁴ Statement of Ralph G Steinhardt, Professor of Law, Before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, US House of Representatives, reproduced in 4 *Criminal Law Forum* 135 (1993).

⁵¹⁵ See 111.

⁵¹⁶ (1890) 17R 38.

⁵¹⁷ C Gane, and S Nash, "Illegal Extradition: The Irregular Return of Fugitive Offenders" (1996) SLPQ 277, 292.

⁵¹⁸ 1997 SCCR 491, 498.

on petition warrant in Glasgow for embezzlement. He fled to Portugal where he was arrested and put on board a British ship in the custody of a police officer from Glasgow who held a warrant granted pursuant to the UK's extradition treaty with Spain but which was of no effect in Portugal. That officer brought him back to Scotland. The High Court declined to look behind the warrant by which Sinclair was brought before the Court. The Court's reasoning was summed up by Lord McLaren as follows: "The extradition of a fugitive is an act of sovereignty on the part of the State who surrenders him. Each country has its own ideas and its own rules in such matters. Generally it is done under treaty arrangements; but if a State refuses to bind itself by treaty and prefers to deal with each case on its merits, we must be content to receive the fugitive on these conditions, and we have neither title nor interest to enquire as to the regularity of the proceedings under which he is apprehended and given over to the official sent out to receive him into custody...I have no doubt that [the officer] was entitled to take the suspender into custody as soon as he was on board a British ship. The objection that the ship was then in Portuguese waters, is one belonging to the region of diplomatic controversy, and could only be taken by the Portuguese authorities. But they were not objecting. On the contrary, by handing the prisoner over to a British officer they intimated that their authority ceased...the public interest in the punishment of crime is not to be prejudiced by irregularities on the part of inferior officers of the law in relation to the pursuer's [sic] apprehension and detention. I may say further that as the Lord Advocate might have the suspender immediately re-apprehended, I should on this ground also be indisposed to sustain this bill, because the liberation obtained under it would not be effective".

We should recall at this point the distinction which ECtHR drew in *Bozano* between cases in which State agents act unlawfully but in good faith and those in which they set out knowingly to use unlawful means to achieve an objective. That distinction lay at the heart of what the House of Lords did when they considered *Bennett* in the context of the disputed power of the (English) High Court to stop proceedings which had become oppressive. As Lord Griffiths put it,

“your Lordships should now declare that where process of law is available to return an accused to this country through extradition procedures our courts will refuse to try him if he has been forcibly brought within our jurisdiction in disregard of those procedures *by a process to which our own police, prosecuting or other executive authorities have been a knowing party*”⁵¹⁹.

Nothing in *Sinclair* contradicts this. There is a perfectly respectable argument that the means by which a foreign jurisdiction delivers up a fugitive in response to a UK extradition request is a matter within the sovereign jurisdiction of that country into which the UK courts should not inquire. Indeed, one can even argue, on the basis of *Stocke v Germany*⁵²⁰, that the return of a fugitive secured by fraud will not breach ECHR, at least as long as officials of the State in which the fugitive is wanted are not in any way involved in the deception.

In *Stocke*, the applicant was a German national who fled to France in order to avoid arrest for tax offences. A police informer offered to assist the German authorities to trace the applicant. He was told that such assistance might be taken into account as an extenuating circumstance at his own trial but it was emphasised to him by the public prosecutor that any action had to be lawful and designed either to discover the applicant’s whereabouts so that an extradition request could be made or to induce him to return to Germany of his own accord. The informer found the applicant and persuaded him to board an aeroplane chartered for the purpose and bound ostensibly for Luxembourg where the applicant thought he was going to discuss investment in a building project in Spain in which the informer had engaged his interest. In fact, the aircraft landed at Saarbrücken, where police officers, forewarned by the informer of the applicant’s arrival (but not of the means used to secure it) arrested him. He was in due course convicted of fraud and sentenced to 6 years’ imprisonment.

In the course of its judgement, the German court dealt with the means by which the applicant had been brought within the German jurisdiction. It

⁵¹⁹ Emphasis added.

⁵²⁰ (1991) 13 EHRR 839.

considered that it had not been established that the public prosecutor's office had known of the "kidnapping" in advance or that it had supported it. The applicant's arrest on German territory under a lawful warrant was not unlawful and was not contrary to international law. Even if the informer had acted with the knowledge of the German police and with their help, at the time of his arrest the applicant had been subject to the jurisdiction of the German courts. He could not rely on a breach of the Franco-German extradition treaty because that treaty created rights and obligations only between the two contracting states. Any violation of it could only affect the mutual relations of those states and could not avail the individual concerned. It was for the aggrieved State to assert its right to ask for the return of the person kidnapped but France had not done so. On the contrary, it had dropped proceedings initiated there on the applicant's claim to have been kidnapped and had intimated that fact to the German authorities.

On appeal in *Stocke*, the Federal Constitutional Court held that there was no rule of international law to prevent a State's courts from dealing with a person brought before them in breach of the territorial sovereignty of another State or of an extradition treaty and that it was apparent from American, Israeli, French and British case law that in such an event the court did not decline jurisdiction unless the other State protested⁵²¹.

ECtHR and EComHR dealt with the case very briefly. They held it not to have been established on the facts that the German State authorities had anything to do with the deception practised upon the applicant and that therefore there had been no breach of the Convention.

It may be said, then, that not every irregularity in the return of a fugitive will result in the dismissal of the prosecution. Even in the House of Lords *Bennett* case, the knowing involvement of the UK authorities in the irregularity was an important factor. The same consideration influenced ECtHR in *Stocke*. This sort of approach to the problem may be seen as consistent with the rule of municipal

law that some irregularities may be excused so that evidence thus obtained may be admitted⁵²². The extreme approach in *Alvarez-Machain* takes a completely disjunctive attitude to the relationship between international law and municipal law. The Scots position, whilst it is liable to be reconsidered and might well move towards that which the House of Lords reached in *Bennett*, is not so extreme and disjunctive. The question of how to deal with the fugitive returned by irregular means has not, in either Scotland or England, really turned on international law issues at all. Rather, the two issues which have been critical to the decisions have been whether or not there is a breach of foreign law and whether or not the UK authorities have been knowingly party to that breach.

It would be misleading to stop at that point for 2 reasons. The first is that in *re Schmidt*⁵²³ the House of Lords limited the application of *Bennett* to cases in which England is the jurisdiction in which the accused is to be placed on trial. In that case, a German national had been the subject of an unsuccessful extradition request from Germany to Ireland. An English police officer deceived him into travelling to the UK, where he was arrested for extradition to Germany. On his application for *habeas corpus*, arguing that the UK extradition proceedings were, in the circumstances, an abuse of the process of the English courts, it was said by Lord Jauncey of Tullichettle that, on an application of *Bennett*, “the position in relation to a pending trial in England is wholly different to that in relation to pending proceedings for extradition from England”⁵²⁴. Lord Jauncey reasoned that, whereas in relation to a trial the power of the High Court to intervene is the defendant’s only protection against oppression, in the case of extradition the fugitive is protected both by the discretion of the Secretary of State and by the fact that the courts of the requesting state are likely to have powers similar to those held to exist in *Bennett*.

⁵²¹ It is not known what cases the Constitutional Court had in mind. However, their consideration significantly pre-dated *Bennett*. The Israeli case was probably that of *Adolf Eichmann* 36 ILR 5 (1961) which was so unusual as to constitute a very unsafe precedent.

⁵²² *Lawrie v Muir* 1950 JC 19.

⁵²³ *Supra*.

⁵²⁴ At 258.

Having regard to the attitude of the German courts in *Stocke*, of the US Supreme Court in *Alvarez-Machain* and to that of the High Court of Justiciary in *Bennett, Petitioner*, Lord Jauncey may have been over-optimistic. It is, however, clear that the House of Lords was seeing *Bennett* as restricted in its application and was not prepared to apply it to facts in which a UK police officer had circumvented the law of Ireland by fraud.

Despite that-and this is the second reason for not stopping above-much was said in *Bennett* about the fact that the court would stop a trial process not only where the defendant had been brought to the UK in breach of foreign law but also where he had been brought in breach of *international* law. In *Bennett*, that was strictly *obiter* because there was no identified breach of international law in that case. An unsuccessful attempt was made to apply it in *R v Dean and Bolden*⁵²⁵ and it was invoked successfully by the defence in *R v Charrington and Others*⁵²⁶. These cases were concerned with the interdiction of drug trafficking on the high seas as contemplated in Article 17 of the 1988 UN Drugs Convention. In the case of *Charrington*, the Council of Europe Agreement on Illicit Traffic by Sea Implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1995 was also relevant.

In *Charrington*, UK Customs Officers had boarded a maltese-registered ship 100 miles off the coast of Portugal. They had obtained Maltese consent to the boarding by telling the Maltese authorities that the ship was “off the coast of the UK” at a time when it was actually tied up in a Portugese harbour.

Judge Foley’s reasoning is not a model of lucidity. One suspects that it assumes knowledge of the debate which had preceded it. At its most essential, however, he was presented with a case in which he considered that UK Customs Officers had exhibited what he called “carelessness and recklessness for disregard for the rules of procedures, Convention of Maltese law, British law, and international law” and had also destroyed evidence. Nowhere in his judgement did

⁵²⁵ (1998) 2 Cr App R 171.

he say in clear terms exactly why he was staying the proceedings as an abuse of process; but he did refer to *Bennett* and it is clear that breach of the international law of the sea by boarding a vessel flagged in a foreign sovereign State, consent having been obtained by deceit, was a component in his decision.

As authority, *Charrington* is worth very little. At least, however, it may be said that *Bennett* has in it the potential for breach of international law to be used as a basis for a finding of abuse of process such as to justify the stopping of a prosecution. Further support for this position may be derived from *R v Mullen*⁵²⁶ in which UK security forces had procured the deportation of the appellant from Zimbabwe by unlawful means in circumvention of extradition procedures and, in the words of Rose LJ, “in breach of Public International Law” (it appears that it may have been international human rights law that he had particularly in mind). The conviction was quashed.

Conclusion

Certain themes emerge from the foregoing consideration of extradition law. The most obvious of these is the continuing Anglocentricity of the law. While the 1870 Act governed the procedure, Scots law was almost entirely excluded. To the very limited extent that the Scottish courts did have a jurisdiction, they were required to operate legislation which assumed the operation of *habeas corpus* and so necessitated the use of the *nobile officium*. And, although there is now a Scottish extradition jurisdiction, the law continues to have a substantial Anglocentric component. Notwithstanding what the High Court said in *Wan Ping Nam*, the legislation assumes that there is a direct Scottish equivalent to *habeas corpus*. The Scottish jurisdiction continues to be excluded from the arrangements for extradition to the USA. English law has exercised a major influence on the Commonwealth Rendition Scheme and the arrangements with Ireland, to the exclusion for all practical purposes of Scots law.

⁵²⁶ Unreported, Bristol Crown Court, 4 February 1999; transcript of judgement of Judge Foley on file with writer.

⁵²⁷ Unreported, Court of Appeal, 4 February 1999 (coincidentally, the same date as *Charrington*).

The UK's attitude to ECE has also been highly Anglocentric. That was clearly apparent in the unconstructive attitude taken to the original negotiations and in the development of the UK's thinking on the subject. Even on accession, the information which the UK gave to PC-OC took no account of the existence of Scots law or of a Scottish jurisdiction.

It is not suggested that the UK has ever taken a deliberate decision to marginalise Scots law in relation to extradition. That marginalisation is more likely to reflect the *assumptions* of the Home Office, which is, after all, a territorial department whose principal remit relates to England and Wales and not to either Scotland or Northern Ireland. One may wonder whether it also reflects a failure on the part of the Scottish Office to appreciate the significance of developing extradition law and to attend appropriately to the interests of Scots law.

The second theme which emerges is that municipal law is placed clearly in a dominant position; and this does appear to be a matter of policy. At least, it is manifested in the policy choices demonstrated in the UK's legislation and treaty reservation practice and one hopes and assumes that these are matters of deliberate policy and not simply the manifestation of unconscious assumption.

Fundamentally, section 4(2) of the 1989 Act requires that municipal law should be given a dominant position. Beyond this, it is clear that both the Commonwealth Rendition Scheme and the arrangements with Ireland depend on municipal statute. In the context of ECE, the UK has made reservations which reflect municipal law substantially. The single special extradition arrangement into which the UK has entered drew on the 1989 Act rather than on any treaty.

The priority of municipal law is also reflected in the judicial phase of extradition where the UK is the requested state. To some extent, this might be a matter of the domestic preoccupations of judges; but even if that is so, it can be said that it is a tendency which is encouraged by a legislative structure which takes its tone from section 4(2) of the 1989 Act. So we see an insistence that the court of committal should not attempt to construe even a treaty which has been

incorporated by Order in Council. We also see the courts reasoning by analogy with municipal law as to the effect of delay on the extradition process but also as to the principles by which extradition treaties are to be interpreted by those courts which are allowed to consider them.

All of this tends to confirm the conclusion drawn from the last chapter, on the theory of the relationship. Scots law follows the general UK practice of affording international law a lesser priority than municipal law. The same conclusion can be drawn from the UK preference for the Third Pillar of the EU over the first, considered in this chapter in the context of, but not under exclusive reference to, extradition. We shall in fact see the same tendency in mutual assistance law, though somewhat less strongly.

Only in one area is this municipal law priority significantly compromised and that is in relation to European human rights law. We have seen from *Soering* and the cases which led up to it that the acceptance and manner of discharge of international extradition arrangements will be affected significantly by ECHR; and it is also possible that international law other than human rights law may in some cases be mediated into Scots law through the Strasbourg cases. Nevertheless, it is also clear that in the event of direct conflict between the Convention rights and UK primary legislation (but not legislation of the Scottish Parliament), the legislation will take precedence. We are justified in concluding that we need not, in the light of extradition, modify to any significant extent the proposition that, in the relationship between international law and municipal law, municipal law has priority.

4. MUTUAL LEGAL ASSISTANCE

Introduction

In its widest sense, the expression "mutual legal assistance" includes everything from extradition to the informal exchange of information and practical help by police forces or other law enforcement agencies, including business regulatory bodies. The expression is used here, however, in the sense in which it has been used by Gilmore in the introduction to his collection of materials on the subject: "By mutual legal assistance is meant the process whereby one state provides assistance to another in the investigation and prosecution of criminal offences...a 'broad consensus' has developed as to the core measures which are covered. These include...providing written and documentary evidence for use in foreign court proceedings; the service of summonses and other judicial documents on behalf of another country; making arrangements for the personal attendance of witnesses at court hearings abroad; and, the search for and seizure of materials for use in evidence in overseas proceedings. More recently a trend has developed...to extend the traditional reach of mutual assistance to encompass the tracing, freezing and confiscation of the proceeds of crime"⁵²⁸. This definition (which is derived directly from the speech of the Home Office Minister of State during the Second Reading debate on the 1990 Act⁵²⁹) excludes extradition, police co-operation⁵³⁰ and co-operation between business regulators⁵³¹.

By contrast with its extradition practice, the UK does not require the existence of a mutual legal assistance treaty ("MLAT") before it will give or seek such assistance. Its mutual assistance legislation, the Criminal Justice

⁵²⁸WC Gilmore (ed), *Mutual Assistance in Criminal and Business Regulatory Matters*, Grotius, 1995, xii.

⁵²⁹HL Debs Vol 513, 12 December 1989, col 1215.

⁵³⁰ For accounts of police co-operation see, *inter alia*, Malcolm Anderson, *Policing the World*, Clarendon Press, 1989; EA Nadelmann, *Cops Across Borders*; and Bill Heberton and Terry Thomas, *Policing Europe: Co-operation, Conflict and Control*, St Martins Press/ Macmillan Press, 1995.

(International Co-operation) Act 1990 ("the 1990 Act") is applicable in any case in which a request is received or sent. Notwithstanding that, however, the UK is party to a web of MLATs, some multilateral and others bilateral. Accordingly, although the existence of a relationship between international law and municipal law is not entrenched in relation to mutual legal assistance in quite the way it is as regards extradition, that relationship remains fundamental to mutual assistance law.

One might have thought that developments in international trade, the multiplication of means of locomotion and the phenomenon of criminal gangs operating continuously over several countries, all as described by Clarke and von Liszt in the passages quoted on the first page of this thesis, would have led states to develop general mutual legal assistance alongside extradition. As early as 1896 the Hague Conference on Private International Law agreed a Convention on Civil Procedure, which made provision, *inter alia*, for the service of process in civil and commercial matters. The development of judicial co-operation in the private law field has been continuous since then⁵³². In the criminal law field, however, matters proceeded much more slowly. Gilmore attributes this to factors which include "a strong disinclination to enforce the penal laws of third countries" and the orthodox international law position which he summarises as "the absence of a duty to render such assistance in the absence of a treaty coupled with a well established customary rule that judicial and enforcement activities in a foreign state, absent consent, constitute violations of territorial sovereignty"⁵³³.

To these we may add some particular features of municipal law. The jurisdiction of the UK criminal courts proceeds essentially upon the territorial

⁵³¹ For accounts of such co-operation, see Gilmore, *Mutual Assistance*...xxiv and Bridget Chase, "Mutual Assistance to Overseas Business Regulatory Bodies" in *Action Against Transnational Criminality Volume II*, Commonwealth Secretariat, 1993, 27.

⁵³² For an account of that development see David McClean, *International Judicial Assistance*, chapters 2-4.

⁵³³ Gilmore, *Mutual Assistance*..., *loc cit*.

basis, such variations from that as exist being exceptional⁵³⁴. Where offences are prosecuted within the territorial jurisdiction in which their facts occurred there will almost always be less need to obtain evidence from a foreign jurisdiction than in a case where jurisdiction is taken on some other basis, such as the active personality principle. Most of the witnesses and real evidence⁵³⁵ are likely still to be within the territory and the need for assistance is likely to be small. In 1996-97 there were from Scotland outgoing requests for mutual assistance by the taking of evidence in only 21 cases⁵³⁶ but in the same period there were 149,112 prosecutions before the Scottish municipal courts⁵³⁷. We do not know in how many of those 21 cases the evidence from other jurisdictions was crucial but even if it was essential in all of them (which is unlikely) the loss of 21 cases (even serious cases) out of over 149,000 would have been statistically insignificant.

Next, Article 8 ECMA precludes the punishment of a witness who, having been cited in a foreign territory (and not re-cited whilst voluntarily within the territory of the requesting state), fails to appear. This, it is said, reflects "an international custom by which witnesses...are completely free not to go to the requesting country"⁵³⁸. The absence of any means by which a witness in a foreign territory could be compelled to attend at the trial meant that a facility for

⁵³⁴ For an analysis of the various bases of jurisdiction applied in Council of Europe member states, see European Committee on Crime Problems, *Extraterritorial criminal jurisdiction*, Council of Europe, 1990. See also (amongst many others) Piet Jan Slot and Eric Grabandt, *op cit*; Albin Eser, "The Vicarious Administration of Justice: An Overlooked Basis of Jurisdiction" 31 *Harvard International Law Journal* 108 (1990); Geoff Gilbert, "Crimes sans Frontières: Jurisdictional Problems in English Law" (1992) 63 *B Yb Int'l L* 414; Paul Coggins and William A Roberts, "Extraterritorial Jurisdiction: An Untamed Adolescent" in W Gilmore (ed), *Action Against Transnational Criminality*, Commonwealth Secretariat, 1992, 33; Colin Warbrick and GR Sullivan, "Territorial Jurisdiction..."; Geoff Gilbert, "Who Has Jurisdiction for Cross-Frontier Financial Crimes?" [1995] 2 *Web JCLI* 76; Matthew Goode, "Two New Decisions... ; A Mark Weisburd, "Due Process Limits on Federal Extraterritorial Legislation?" 35 *Columbia Journal of Transnational Law* 379 (1997); and Matthew Goode, "The Tortured Tale of Criminal Jurisdiction" 21 *Melbourne University Law Review* 411.

⁵³⁵ The expression is used in its technical sense, to mean physical objects which have features of probative significance (see AG Walker and NML Walker, *The Law of Evidence in Scotland*, Wm Hodge & Co Ltd, 1964, 440).

⁵³⁶ Richard G Stott, "Mutual Legal Assistance: The View From the Scottish Trenches" in Cullen and Gilmore (eds), *Crimes sans Frontières*, 191, 192.

⁵³⁷ Crown Office and Procurator Fiscal Service, *Annual Report 1996-97*, 41.

obtaining the statement of that witness was of limited value to a legal system, such as that of England or Scotland, which demanded the physical presence of the witness in court before the evidence of the witness could be regarded as admissible⁵³⁹. As an inter-departmental working group put it, there was a belief that such agreements "were in general unlikely to be of significant use to us because the insistence of our law on oral testimony left little scope for the admission of witness statements and other documents, which form the bulk of the traffic"⁵⁴⁰. Accordingly, few of the prosecutions which must have failed because it was not known what evidence a witness in a foreign territory could give would have been saved merely by the existence of a means of obtaining a statement. They would still have foundered on the inability of the UK as requesting state to compel the attendance of the witness. In order to make significant use of international judicial assistance, the UK would have required to revise its municipal laws so as to enable it to make significant use of written evidence. Although such revision has now taken place⁵⁴¹, the state of the law of criminal evidence and procedure in both England and Scotland until at least the late 1980s was such that there was little incentive to enter into arrangements by which evidence could be obtained from foreign states. It was unlikely that it could be used even if it was obtained. Even now, the UK is anxious to secure a means of enforcing witness citations in other EU Member States. In the context of the paper submitted to the K4 Committee entitled "Mutual Recognition of Judicial Decisions and Judgements in Criminal Matters"⁵⁴² the UK, arguing in support of wide cross-border enforceability of decisions of criminal courts, notes and prays in aid the complaints of practitioners about the unenforceability of witness

⁵³⁸ Council of Europe, *Explanatory report on the European Convention on mutual assistance in criminal matters*, 1969, 18.

⁵³⁹ McClean, *op cit*, 121-123.

⁵⁴⁰ *International Mutual Assistance in Criminal Matters: Report to Ministers from the Inter-Departmental Working Group*, July 1987 (not yet in the public domain) (hereafter, "Working Group").

⁵⁴¹ See Criminal Procedure (Scotland) Act 1995 s259(1) and (2)(b).

⁵⁴² See 84-5 above.

summonses⁵⁴³ served in foreign jurisdictions.

None of this, of course, has any relevance to the *provision* of assistance to foreign states which sought to obtain evidence within the UK. Although it seems that by 1975 at the latest the Crown Office in Scotland was arranging for the evidence of witnesses resident in Scotland to be obtained for foreign criminal proceedings⁵⁴⁴, this was not done as a matter of obligation, was *ad hoc* and somewhat informal and, in the absence of legislation giving power to carry out searches on behalf of foreign authorities, cannot have extended to compulsory measures. The UK did not engage in mutual assistance in any formal way and municipal law was, as will be described shortly, far from adequate. Harding probably got nearest the mark when he observed that the UK took the attitude that "as a common law jurisdiction with well-established mechanisms for ensuring the fairness and effectiveness of criminal proceedings, it was neither right nor possible to take much cognisance of other countries' judicial processes"⁵⁴⁵. Certainly such an attitude seems perceptible in the accounts noted by McClean of official attitudes to commissions rogatoires received at the turn of the century⁵⁴⁶. It will be recalled that one of the incentives for states to enter into extradition arrangements is the facility they provide for getting rid of undesirables. Where the undesirable is already in a foreign country, that incentive is removed. Absent that incentive, absent the incentive of rendering convictions more probable in a significant number of cases before the municipal courts and, having regard to the UK's dismissive attitude to other legal systems (as reinforced by international law orthodoxy), it is perhaps not surprising that the UK's engagement in mutual legal assistance to any significant extent was long delayed.

The development of the law

The law before the 1990 Act

Whatever the underlying reasons for the UK's lack of enthusiasm for mutual legal

⁵⁴³ Citations.

⁵⁴⁴ *Criminal Procedure in Scotland (Second Report)* Cmnd 6218, 1975, para 43.27.

⁵⁴⁵ *Op cit*, 235.

⁵⁴⁶ *Op cit*, 123. The USA was tarred with the same brush-see Jones, *op cit*, 538-545.

assistance, it is clear that municipal law on general assistance was in an unsatisfactory state until the late 1980s. Section 5 of the Extradition Act 1873 made provision for the Secretary of State to order a police magistrate or justice of the peace to take evidence for the purpose of any criminal matter pending before a foreign (criminal) court in the same way as if the witness were appearing in connection with a charge on indictment; but that provision was little used. In the mid-to late 1980s, the Home Secretary signed about 25 such orders a year⁵⁴⁷. However, the practical application of that provision to Scotland was said to be "unclear as it is based on procedures which are peculiarly English"⁵⁴⁸. This was, of course, entirely consistent with the Anglocentricity of everything else in the Extradition Acts of the late 19th and early 20th centuries. But even in English law there were problems. In particular there was doubt whether a case which was before a grand jury in the USA or being dealt with by an examining magistrate in a civilian jurisdiction could be said to be "pending" before a court or tribunal, which was an essential pre-requisite to the giving of assistance. This made it difficult to provide assistance to foreign authorities and also made it difficult to give the assurance of reciprocity which Switzerland, for example, required before, in the absence of a treaty relationship, it could give assistance to the UK⁵⁴⁹.

The alternative was an application under section 5 of the Evidence (Proceedings in Other Jurisdictions) Act 1975. That Act was passed in order to enable the UK to ratify the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters 1968⁵⁵⁰ and section 5 represented the application to criminal matters of provisions drafted under reference to a treaty which dealt essentially with private international law issues. It is hardly surprising that the procedure creaked somewhat. Its legacy remains with us in form 23-1 annexed to the Act of Adjournment (Criminal Procedure Rules) 1996 which is required to be

⁵⁴⁷ Working Group, Annex B, para 3.

⁵⁴⁸ *Ibid.*

⁵⁴⁹ *Ibid.*

⁵⁵⁰ See Evidence (Proceedings in Other Jurisdictions) Act 1975, *Current Law Statutes Annotated*, 1975, 34.

used in connection with applications for letters of request other than under the 1990 Act. The form is derived from the 1968 Hague Convention and is inappropriate to criminal procedure⁵⁵¹.

Section 5 provided for an application to the High Court (in England) or the Court of Session (in Scotland) for an order authorising the examination of witnesses following a request from a court or tribunal outside the UK for evidence for use in criminal proceedings "instituted" in that country. The Working Group noted⁵⁵² that this formula raised for England and Wales precisely the same difficulties as regards grand juries and examining magistrates. So far as Scotland is concerned, the Working Group noted that this difficulty did not arise because "different procedures apply"⁵⁵³.

The procedure in Scotland involved a petition to the Inner House of the Court of Session⁵⁵⁴, which was somewhat cumbersome, but at least the existence of the petition warrant procedure, which could properly be regarded as the commencement of proceedings⁵⁵⁵ and which is not altogether dissimilar to (though by no means identical with) the stage in civilian practice at which a *juge d'instruction* becomes seized of a case, meant that Scots law was rather better placed than English to provide assistance. This was entirely fortuitous (because the 1975 Act was drafted in English legal categories) and was not mentioned by the Home Office Minister of State when he was explaining the shortcomings of existing law to the House of Commons⁵⁵⁶. Members were left to assume (unless they knew better) that the whole UK was afflicted by a problem which was in fact particular to English law.

The state of the law as to outgoing requests from Scotland for assistance from foreign authorities was little better. The issue of the obtaining of evidence from a foreign jurisdiction for use in Scotland seems first to have been canvassed

⁵⁵¹ See 217 below.

⁵⁵² *Op cit*, Annex B, para 4.

⁵⁵³ *Ibid*.

⁵⁵⁴ Rules of the Court of Session, R14.3(f).

⁵⁵⁵ *Hamilton v HM Advocate* 1996 SCCR 744.

⁵⁵⁶ HL Debs Vol 513, 12 December 1989, cols 1214-1221.

in 1975 in the Second Report of the Thomson Committee. That Committee noted (without giving any detail) that it was “common practice” for the Crown Office to arrange for the evidence of witnesses resident in Scotland to be obtained for foreign criminal proceedings but that no similar procedure was available for obtaining evidence from abroad for use in Scotland; that the “considerable increase” in foreign travel meant that the obtaining of evidence from witnesses abroad was becoming a “real problem” for the Crown and that some serious cases had had to be dropped because the principal witness was abroad and refused to attend. They therefore considered whether there should be some method whereby in a criminal trial the written record of the evidence of a witness abroad should be admissible. They noted that the objection would be that a judge and jury would not have the chance to see or hear the witness giving evidence but considered that it was “unfortunate” that the prosecution or defence might be unable to prove its case because an essential witness was abroad. They recommended the application of the model used for taking evidence on commission from ill or infirm witnesses within Scotland should be applied to the case of witnesses abroad⁵⁵⁷.

Provision was made in section 32 of the Criminal Justice (Scotland) Act 1980 permitting the sending of a Letter of Request, provided that the evidence could be received without unfairness to either party, but it appears that the Government expected the procedure to be used only in relation to formal evidence. Introducing the provision, the Solicitor-General said that “either side can object to such a request if there is the slightest suggestion that the evidence will be controversial...”⁵⁵⁸.

The first occasion on which the procedure was used was in *HM Advocate v Lesacher*⁵⁵⁹. The accused was a German coach driver who was charged with causing death by reckless driving. He was alleged to have driven on the wrong side of the road and collided with an oncoming car, killing its occupants. The defence sought a Letter of Request, explaining that they required the evidence of

⁵⁵⁷ *Criminal Procedure in Scotland (Second Report)* Cmnd 6218, 1975, paras 43.27-43.30.

⁵⁵⁸ Hansard, First Scottish Standing Committee, 24 June 1980, Cols 1482-1483.

passengers on the coach, all of whom were German residents, and that there was no means of compelling their attendance. Of the 3 who were most essential to the defence, one had not replied to a letter, one had said that she “would probably” attend the trial and the third had said that his state of health precluded his attendance.

The procurator fiscal opposed the issuing of the Letter, arguing that the evidence sought to be recovered was “of such a sensitive nature and so crucial that it required to be tested by cross-examination. Accordingly it would be unfair to the Crown to allow such evidence to be tested by interrogatories”⁵⁶⁰. The sheriff, however, took the view that the unfairness to which the Act referred could not involve inability to cross-examine because if it did no important evidence could ever be sought by Letter of Request⁵⁶¹. On the basis of the Solicitor-General’s remarks, quoted above, it may be that such was precisely the intention of the Government. Be that as it may, the sheriff granted the application for a letter of Request and it was sent. Evidence was obtained and read to the jury, which in due course acquitted the accused⁵⁶².

The approach of the sheriff in *Lesacher* was such as to make the section a useful tool and Gordon commented that the case showed that Parliament had enacted a wider power than the Government had intended⁵⁶³. However, in *Muirhead v HM Advocate*⁵⁶⁴, Lord Cameron took a different view, more consistent with the Government’s expectations.

The case concerned an indictment for fraud. The accused wished to obtain the evidence of an accountant in Dublin, who refused to give evidence or give a precognition to the Crown. He sought to obtain the evidence of the accountant by Letter of Request. The Crown opposed the application and Lord Cameron refused it.

⁵⁵⁹1982 SCCR 418.

⁵⁶⁰At 422.

⁵⁶¹*Ibid.*

⁵⁶²The transcripts of the evidence obtained are reproduced in the report of the case.

⁵⁶³*HM Advocate v Lesacher*, Commentary, 1982 SCCR 431.

⁵⁶⁴1983 SCCR 133.

Lord Cameron was much influenced by the fact that no explanation had been given for the refusal of the witness to attend and does not seem to have appreciated that there is an international practice whereby witnesses have an absolute right to refuse to attend a court in a foreign jurisdiction and that there is no requirement for them to give explanations. In the course of refusing the application, he said that "This procedure is entirely novel; I can well appreciate that it has value in respect of formal evidence...but I think it reasonably clear...that it would be difficult to be satisfied in the case of a witness whose evidence is other than formal, that there could be no unfairness to the opposite party, be he prosecutor or accused, if he were deprived of the opportunity of oral cross-examination..."⁵⁶⁵. With these words, Lord Cameron gave the procedure the kiss of death. The provision remains on the statute book (now as section 272 of the Criminal Procedure (Scotland) Act 1995) but it is unused.

Before leaving section 32 of the 1980 Act, it should be noted that in both *Lesacher* and *Muirhead* it was the Crown which was arguing for a very restricted application of the provision, in line with the Government's intentions. This, of course, was before the Government had decided that international co-operation was a matter of necessity. Having regard to the policy of positive engagement in international co-operation which was to be adopted in the late 1980s and to the fact that it is usually the law enforcement community which calls for increased co-operation, it may be that the Crown attitude in *Lesacher* and *Muirhead* should be regarded as shortsighted and mistaken.

The European Convention on Mutual Assistance in Criminal Matters

The first significant multilateral development in mutual legal assistance had occurred in 1956 when the Committee of Ministers of the Council of Europe instructed the preparation of a draft multilateral Convention on Mutual Assistance in Criminal Matters⁵⁶⁶. This followed a recommendation of the Committee of Experts discussing extradition. Those experts thought that such a convention

⁵⁶⁵At 142.

⁵⁶⁶Council of Europe, *Explanatory report on the European Convention on mutual assistance in criminal matters*, 1969, 5.

would be acceptable to more of the Council's Member States than the Extradition Convention and noted that some countries were already party to bilateral mutual legal assistance treaties⁵⁶⁷. The outcome was ECMA, which established the foundations for such assistance within Europe. More recent developments, such as those within the framework of the European Union, have all proceeded under reference to ECMA, whilst trying to overcome its disadvantages (such as its retention of the "delay inducing features of the traditional system of letters rogatory"⁵⁶⁸).

The UK did not participate in the negotiation of ECMA and, notwithstanding Recommendations of the Committee of Ministers of the Council of Europe exhorting member States which had not done so to ratify ECMA as soon as possible⁵⁶⁹, did not sign until June 1991. Ratification followed in August of that year and the Convention came into force as regards the UK on 27 November 1991. The minute from Home Office Criminal Policy Department which sent copies of the 1987 Working Group Report round other Departments⁵⁷⁰ noted that the decision to set it up "arose from consideration of the line to be taken by the British delegation at the Commonwealth Law Ministers' Meeting in June 1986" when the draft Commonwealth Scheme for Mutual Assistance in Criminal Matters ("the Harare Scheme") was discussed.

The Commonwealth Scheme

Preparation of the Harare Scheme had begun in 1983, Australia having been a

⁵⁶⁷ *Ibid.* Jones asserted in 1953 that states from the civilian tradition has already "covered the globe with a network of treaties to assure judicial assistance among 'civilian' courts" (Harry Leroy Jones, "International Judicial Assistance: Procedural Chaos and a Program for Reform" 62 *Yale Law Journal* 515, 516 (1953); emphasis in original).

⁵⁶⁸ C Gane and M Mackarel, "The Admissibility of Evidence Obtained from Abroad into Criminal Proceedings-The Interpretation of Mutual Assistance Treaties and Use of Evidence Irregularly Obtained" 1996 *European Journal of Crime, Criminal Law and Criminal Justice* 98 at 100.

⁵⁶⁹ Resolution (71) 43 On the Practical Application of the European Convention on Mutual Assistance in Criminal Matters (14 December 1971); Recommendation No R (80)8 Concerning the Practical Application of the European Convention on Mutual Assistance in Criminal Matters (27 June 1980); Recommendation No R (87)1 on European Inter-State Co-operation in Penal Matters (19 January 1987).

⁵⁷⁰ Minute from WJ Bohan to Mr Korniki dated 31 July 1997. Copy on file with author but, since it discusses policy advice to ministers, it is part of a class of materials to which confidentiality

prime mover⁵⁷¹. The draft was circulated for Government observations in June 1984 and published in October 1985. It was discussed at a meeting of Senior Officials in January 1986 and adopted in the following July⁵⁷². The Scheme is the same type of instrument as the Commonwealth Rendition Scheme; that is to say it is not a treaty⁵⁷³ (though it reads like one but for the absence of obligation). Rather, it is an agreed set of recommendations for legislative implementation by each Government⁵⁷⁴. Those recommendations, in the Scheme as adopted, encompass assistance in identifying and locating persons, serving documents, examining witnesses, search and seizure, obtaining evidence, facilitating the personal appearance of witnesses, effecting a temporary transfer of a person in custody to appear as a witness, obtaining production of judicial or official records and tracing, seizure and forfeiting the proceeds of criminal activities⁵⁷⁵. This level of assistance is said to be "more comprehensive than that available under most existing bilateral and regional arrangements"⁵⁷⁶. Given the existing state of UK law, severe difficulty was likely to be encountered in providing such assistance unless legislation was enacted. On the other hand, the essentially common law perspective of the Scheme (reflecting the nature of Commonwealth legal systems) did mean that there were no fundamental incompatibilities between the Scheme and the principles which underlay UK (and especially the English) criminal justice systems.

The problem recognised

The Home Office minute covering the report of the Working Group noted the

attaches and can only be made available for reference after author has obtained specific authority for release.

⁵⁷¹ Working Group Report para 7.

⁵⁷² McClean, *International Judicial Assistance*, 150.

⁵⁷³ Jamaica was critical of the Scheme for this very reason, as it had been of the Rendition Scheme. The Summary Record of the discussions of Commonwealth Senior Officials contains at its start a quite lengthy set-piece speech by the Jamaican delegate recording that criticism (Mutual Assistance in the Administration of Justice: Meeting of Senior Officials to Consider Draft Schemes, 27 January-7 February 1986: Summary Record, Commonwealth Secretariat).

⁵⁷⁴ McClean, *op cit*, 151.

⁵⁷⁵ Harare Scheme, para 1(3).

need to address the Harare Scheme and noted more generally that the UK was "seriously hampered" in providing mutual assistance because of the inadequacy of existing legislative provisions. This, it was said, had earned the UK a bad reputation for negative responses to reasonable requests for assistance and had "caused serious problems for our own prosecution authorities as a result of other States refusing to render us assistance because of lack of reciprocity". Moreover, the continued reliance by the UK on what the Working Group called "antiquated and limited powers to give assistance to foreign courts" amounted to an obstacle to assisting in investigations. The Working Group noted that this had "caused considerable difficulties and has been a point of friction with the United States. The effect is that the United Kingdom is isolated through its inability to offer other countries reciprocal treatment. We have a good reputation for co-operation in the exchange of information already available to our investigatory agencies, but a bad reputation in terms of the provision of hard evidence for criminal prosecutions". The Working Group also reported that "foreign countries, including some of our European partners and the United States, are privately highly critical of the United Kingdom's performance"⁵⁷⁷. The Working Group concluded that there were "strong arguments in favour of reform of United Kingdom mutual assistance law with a view to participation in formal mutual assistance arrangements" and suggested consultation followed by the introduction of legislation in the 1988/89 session⁵⁷⁸. At the same time, the 1988 UN Drugs Convention was under negotiation and this included what amounted to an internal MLAT at Article 7⁵⁷⁹.

The modernisation of UK mutual assistance law

The legislation which was introduced was Part I of the 1990 Act, which may be described aptly with the words which the UN *Manual on the Model Treaty on*

⁵⁷⁶ *Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth: Further Explanatory Material prepared for Commonwealth Jurisdictions by Professor David McClean and Mr WJ Menary, Vol 2, Commonwealth Secretariat, 1988, 15.*

⁵⁷⁷ Working Group Report, para 5.

⁵⁷⁸ Working Group Report, para 20.

⁵⁷⁹ See 176 below.

Mutual Assistance in Criminal Matters uses to describe the optimum legislation on the subject. It is "a general instrument that can be used to implement all mutual assistance treaties and conventions", which mirrors the scope of the treaties "by establishing a scheme applicable to all offences included in the treaties", which allows "for applications for different types of compulsory orders that are consistent with the types of assistance listed in the treaty", which permits applications to be "made in relation to foreign matters that are at the investigation or proceeding stage" and which includes "powers for requests to be made by or through domestic authorities to a foreign state for assistance"⁵⁸⁰.

The UK duly signed and ratified ECMA and became party to the Harare Scheme. These arrangements are general. The UK also negotiated bilateral MLATs with 3 foreign states, namely the USA⁵⁸¹, Thailand and Canada.

There are obvious parallels between the development of the UK approach to mutual legal assistance in criminal matters and the development of extradition. The UK did not engage seriously with its continental European neighbours in relation to either subject until the middle 1980s when it was finally realised that the difficulties which UK law put in the way of giving assistance to other jurisdictions was undermining the UK Government's stress on law and order and the necessity of fighting drug trafficking. In the case of both the Anglocentricity of UK policy during the middle years of the twentieth century meant that it was necessary at the end of the 1980s to accept multilateral European Conventions to which the UK had made no constructive contribution (in the case of ECMA, no contribution at all) and the content of which was not, therefore, necessarily what the UK would have chosen as most congenial from the point of view of its municipal law. It was therefore necessary for the UK to attempt some "personalisation" of both instruments by the use of reservations.

⁵⁸⁰ United Nations, *International Review of Criminal Policy* Nos. 45 and 46, 1995, 31.

⁵⁸¹ The UK had, as colonial power, entered into an MLAT with the USA as regards the Cayman Islands in 1986; but that treaty did not as such affect UK law in general or Scots law in particular and so it is not discussed here. For a description of its provisions, see Gilmore, *Mutual Assistance in Criminal and Business Regulatory Matters*, xx.

ECMA and the UK

Introduction

Although the UK's review of its approach to mutual assistance was prompted most immediately by the need to define its negotiating position in relation to what became the Harare Scheme, that Scheme itself represented an attempt to catch up with European developments and to "adapt the 1959 Convention to reflect more fully Commonwealth traditions and concerns and to break new ground"⁵⁸². ECMA was, then, foundational, even for the Commonwealth arrangements, and so it is convenient to consider it first.

As we have already noted, the UK did not participate in the negotiation of ECMA and did not, therefore, take the opportunity to exert any direct influence on the drafting⁵⁸³. At the time of accession the UK, by definition, found ECMA acceptable, though in the absence of any overwhelming incompatibility with the fundamental principles of national law, the acceptability of a treaty to a given state will depend on how badly that state wants the benefits which the treaty may be expected to bring. As we have seen, the UK decided, in the mid to late 1980s that international co-operation had become a matter of necessity.

The general principle of the Convention is stated in Article 1. The parties "undertake to afford each other...the widest measure of mutual assistance in proceedings in respect of offences the punishment of which, at the time of the request for assistance, falls within the jurisdiction of the judicial authorities of the requesting Party". This is particularised in Articles 3 and 7. By Article 3, the requested Party is required to execute, in the manner provided for by its law, any letters rogatory relating to a criminal matter and addressed to it by the judicial authorities of the requesting party for the purpose of procuring evidence or transmitting articles to be produced in evidence, records or documents. Article 7 makes provision for the service of writs and records of judicial verdicts, the word

⁵⁸² Gilmore, *Mutual Assistance in Criminal and Business Regulatory Matters* xvii.

⁵⁸³ Ireland did participate in the negotiations, so the treaty which resulted was not entirely uninfluenced by the common law.

“writs” being wide enough to include the citation of witnesses⁵⁸⁴. However, Article 8 prevents a witness who has been served with a citation, other than in the territory of the state in which he is required to appear, from being penalised for failure to answer the citation.

The obligation to assist is by no means unqualified. Purely military offences are excluded from the ambit of the treaty altogether⁵⁸⁵, Article 2 permits refusal of assistance in the case of a political offence⁵⁸⁶ and Article 5 authorises certain reservations as regards the execution of requests for search and seizure.

Reservations

Since the UK did not contribute to the drafting of ECMA the most fruitful field for examination from the point of view of this thesis will be the reservations which it made on acceding to the treaty. These reflect UK attitudes to the provisions of the Convention in a way which the bare fact of accession cannot do.

Article 2 provides that assistance may be refused if the request concerns an offence which the requested party considers a political offence, an offence connected with a political offence or a fiscal offence⁵⁸⁷. Article 2 also permits refusal of a request if the requested Party considers that the execution of the request is likely to prejudice the sovereignty, security, *ordre public* or other essential interests of its country. The UK has reserved the right to refuse assistance if the person who is the subject of a request for assistance has been convicted or acquitted in the UK or in a third State of an offence which arises from the same conduct as that giving rise to proceedings in the requesting state in respect of that person.

At first sight this is an unexceptionable application of the *ne bis in idem*

⁵⁸⁴ *Explanatory report on the European Convention on mutual assistance in criminal matters*, 1969, 17.

⁵⁸⁵ Article 1(2).

⁵⁸⁶ It also authorises refusal in the case of a fiscal offence but that is modified by Article 1 of the Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters 1978.

⁵⁸⁷ The facility for refusing assistance in relation to fiscal offences was, the subject of Article 1 of the Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters 1959, 1978, which provided that the parties would not exercise their right to refuse assistance solely on the ground that the request concerns a fiscal offence.

principle, which finds expression in Scots law in the plea of tholed assize. On examination, however, it may be questioned whether the reservation is appropriate, either at all or in its particular terms. Its potential effect, especially in combination with the requirement of English (but not Scots) law that proceedings should have been commenced before search and seizure may be carried out on behalf of a foreign authority⁵⁸⁸ is to place a significant restriction on investigative assistance.

The expert committee which drafted ECMA considered the inclusion of such a clause on the model of ECE and decided not to do so because it would have reduced the scope of the Convention and would have required the requesting party to take a decision on the case without having full information⁵⁸⁹. At the stage of investigation, the general nature of the offence will probably be known but the decision whether or not to prosecute or continue with a prosecution and the selection of the particular charge must usually await the result of inquiries. The balance which both international human rights law and municipal criminal law seek to find between the interest of the community in the proper investigation of crime and the protection of the rights of the individual⁵⁹⁰ may be argued to favour full investigation within the law so that a decision can be taken on the basis of all the relevant information with the position of the accused being protected by a plea in bar of the trial.

Both Scots law and English law permit the accused to take a plea in bar of further proceedings based on the *ne bis in idem* principle⁵⁹¹ and recognise that the plea may be founded by proceedings in a foreign court⁵⁹². The immunity of a person from a second trial for the same offence is guaranteed by both Article 4 of

⁵⁸⁸ See 202 below.

⁵⁸⁹ Council of Europe, *Explanatory Report on the European Convention on mutual assistance in criminal matters*, 1969, at 13-14.

⁵⁹⁰ *Soering v United Kingdom* (1989) 11 EHRR 439 at 468 (para 89); *Doorson v The Netherlands* (1996) EHRR 330 at 358 (para 70); *Milne v Cullen* 1967 JC 21 at 30.

⁵⁹¹ *Renton and Brown's Criminal Procedure*, 6th edition, W Green/Sweet & Maxwell, 1996, paras 9-08 - 9-13; *Archbold; Criminal Pleading, Evidence and Practice*, Sweet & Maxwell, 1998, paras 4-116 - 4-119; *Blackstone's Criminal Practice*, Blackstone Press, 1997, paras D10-28 - D10-37.

Protocol 7 ECHR (to which the UK is not a party) and Article 14(7) of the International Covenant on Civil and Political Rights (to which it is). It is possible, but undecided, that *ne bis in idem* is within the ambit of Article 6 ECHR⁵⁹³. The *ne bis in idem* principle is, accordingly, well recognised in international law. A truly co-operative attitude, manifesting mutual trust, would, it may be argued, leave the matter to be dealt with by the trial jurisdiction. One may perhaps perceive in the reservation a symptom of continuing distrust of foreign judicial process, akin to that which underlay the *prima facie* case requirement in extradition law. Both represent an insistence on the application of UK domestic law to a foreign process. In an extradition context, La Forrest, J said in the (Canadian) case of *Argentina v Mellino*⁵⁹⁴ that "the assumption by an extradition judge that...defences... would not be given appropriate consideration by the foreign court...amounts to a serious reflection not only on a foreign Government to whom Canada has a treaty obligation but on its judicial authorities concerning matters that are exclusively within their competence". Just such an assumption seems to underlie the UK reservation.

There is a further (presumably inadvertent) parallel with the effect of the *prima facie* case requirement. We have seen that the effect of that requirement was and is to impose judicial scrutiny of the prosecution case even though there is no equivalent scrutiny in Scottish domestic criminal procedure. In a mutual assistance context, the reservation to Article 2 imposes a greater restriction on investigation on behalf of a foreign authority than applies to a domestic investigation.

The reservation applies to a previous conviction or acquittal for "an offence which arises from the same conduct as that giving rise to proceedings in the requesting state in respect of" the person who is the subject of the request. By

⁵⁹² *MacGregor and Inglis* (1846) Ark 49 at 60; *Aughet* (1919) 13 Cr App R 101; *Treacy v Director of Public Prosecutions* [1971] AC 537 at 526; *Thomas* [1985] QB 604.

⁵⁹³ DJ Harris, M O'Boyle and C Warbrick, *Law of the European Convention on Human Rights*, Butterworths, 1995, 217.

⁵⁹⁴ [1987] 1 SCR 436 at 554.

referring to an offence arising from the same conduct as the earlier proceedings, rather than to an earlier prosecution for the same offence, this is wider than the formula in both Article 14(7) ICCPR and Article 4, Protocol 7 ECHR, both of which preclude further trial for "an offence for which [the person] has already been finally convicted or acquitted". It is also wider than the formula used in Article 9 ECE, which deals with the situation in which judgement has been passed by the authorities of the requested party "in respect of the offence or offences for which extradition is requested". The UK's reservation to Article 9 ECE is to refuse extradition "if it appears that that person would if charged with that offence in the United Kingdom be entitled to be discharged under any rule of law relating to previous acquittal or conviction"⁵⁹⁵; on this formula, domestic law is engaged with precision. The reservation to Article 2 ECMA, on the other hand, uses a formula of its own. Assistance may be refused if the offence arises from the same conduct as that which gave rise to the conviction; but in neither Scots nor English law is it enough that the offence merely arises from the conduct. As Lord Morris made clear in *Connelly v DPP*⁵⁹⁶, the offence upon which it is sought to prosecute must be the same or substantially the same as the one in which there has been a previous acquittal or conviction. In Scots law, a telling example is to be found in *Tees v HM Advocate*⁵⁹⁷. In that case the accused had been indicted for attempted murder. He pled guilty to a reduced charge of assault to severe injury, danger of life and permanent impairment, for which he was sentenced to seven years' imprisonment. About 3 months after that sentence was imposed the victim died and Tees was indicted for culpable homicide. In relation to that charge, Tees had already been convicted of an offence which arose from the same conduct as that giving rise to proceedings-precisely the test set out in the UK reservation. The victim was the same, the conduct was the same and Tees had been convicted of

⁵⁹⁵ European Convention on Extradition Order 1990 (SI 1990 No 1507) Sched 4; this is consistent with Article 2(4) of the Additional Protocol to the European Convention on Extradition 1975, which permits the application of "wider domestic provisions relating to the effect of *ne bis in idem*".

⁵⁹⁶ [1964] AC 1254, HL, especially at 1310-28.

⁵⁹⁷ 1994 SLT 710.

endangering the victim's life. All that had changed was the result. The result of the conduct is not a factor in the test set out in the reservation; but the High Court, after reviewing what it called a "long line of authorities", held that the result was critical. It was the supervening death which took the case out of the ambit of *res judicata*.

This reservation, then, has the potential to permit the UK to place an insuperable obstacle in the way of a foreign investigation in circumstances in which no such obstacle would be placed in the way of a national investigation. The issues are subtle and it seems unlikely that the reservation was formulated consciously so as to bring about the situation described.

Article 3 provides that the requested Party shall execute requests "in the manner provided for by its law". This formula leaves open the possibility that municipal law in the requested state will permit execution according to the procedures of the requesting state, a course Dutch law takes in relation to requests under its bilateral MLATs with the USA and Canada⁵⁹⁸. US law provides a similar facility by permitting the person appointed by the court dealing with the request to apply "in whole or in part the practice and procedure of the foreign country"⁵⁹⁹. The UK legislative approach is, by contrast, to apply municipal procedures, albeit with some relaxation as regards the compellability of witnesses⁶⁰⁰. The kind of difficulties which can result from this approach may be illustrated by a Norwegian case⁶⁰¹ in which English police officers had, for the purposes of a case pending before Norwegian courts, given evidence before English courts without stating their true identities. This was permissible in English law. The evidence was, however, held to be inadmissible in Norway, where the law is that police officers

⁵⁹⁸ Rijnhard Haentjens, "Mutual Assistance in Criminal Matters", in Bert Swart and Andr Klip (eds), *International Criminal Law in the Netherlands*, Max Planck Institute, 1997, 123 at 134.

⁵⁹⁹ 28 USC 1782.

⁶⁰⁰ Criminal Justice (International Co-operation) Act 1990 Sched 1.

⁶⁰¹ Hysterett (39B/1997) May 27, 1997 [1997] Rt 869, [1997] 12 Euro CL 138 (para 132).

are only able to give evidence anonymously in exceptional circumstances⁶⁰². The UK "reserves the right not to take the evidence of witnesses or require the production of records or other documents where its law recognises in relation thereto privilege, non-compellability or other exemption from giving evidence". This again is consistent with a deep seated distrust of foreign process.

It is important to recognise that the UK reservation to Article 3, both in its terms and in its subject matter, has to do with the law of evidence. It refers to privilege and non-compellability as exemptions from giving evidence. It does not address or seek to protect property rights in records and documents or to make any exception on the basis of contractual arrangements as to the confidentiality of the information which such records and documents contain.

Non compellability relates particularly to the position of the spouse of an accused person⁶⁰³. The issue of legal professional privilege came before the courts in *Crown Prosecution Service on behalf of Director of Public Prosecutions for Australia v Holman Fenwick & Willan*⁶⁰⁴. In that case, a Justice of the City of London had refused an application under section 4 of the 1990 Act for documentary evidence, required for a prosecution in Australia, held by the defendant's London solicitors, who were the respondents to the application and to this appeal. The justice decided that the documents sought were privileged and that he could not require their production. The position of the solicitors was that their client had not agreed that there be any waiver of privilege or confidentiality attaching to documents held and that accordingly they could not produce them without a Court Order. Their client had been convicted of offences in Australia and they had been unable to get instructions. Nor did they expect to be able to get them in the future.

⁶⁰² The principles developed by the European Court of Human Rights are somewhat similar to the Norwegian position-see the summary of ECHR law in Karen Reid, *A Practitioner's Guide to the European Convention on Human Rights*, Sweet & Maxwell, 1998.

⁶⁰³ *Casey v HM Advocate* 1993 SLT 33 makes it clear that a mere cohabitee, as in that case, is not in any special position, and *Renton & Brown* para 24-27 suggests that a former spouse is always compellable.

Since paragraph 4(1)(a) of Schedule 1 to the 1990 Act provides that a person shall not be compelled to give in the proceedings any evidence which he could not be compelled to give in criminal proceedings in the part of the United Kingdom in which the nominated court exercises jurisdiction, Morland J, who delivered the judgement, said that he was required to consider English law, which on the subject of legal professional privilege is set out in section 10 of the Police and Criminal Evidence Act 1984. That Act does not apply in Scotland and so its detail need not concern us. Upon a construction of that statute, he held that confidentiality is not the test by which material sought is exempt from production but that the sole test is whether the material in the documents is covered by legal privilege as defined by the statute. He examined sundry cases from the English courts on the construction of the relevant part of PACE but he also drew on an Australian case⁶⁰⁵ in which the scope of legal professional privilege was considered and found to be somewhat narrower than it is in England. On the particular facts of the case he held that the Justice had been wrong to refuse the application and so the appeal was allowed.

There was no suggestion in the case that the Divisional Court was bound to consider Australian law or even that they did so because the case involved a request from that country. The Australian case is handled simply as comparative material from another common law jurisdiction. Nevertheless, there must be a certain attraction for a court in being able to indicate that the outcome would be the same even if the law of the requesting State was applied.

The underlying purpose of legal professional privilege is said to be "to enable a man to consult his solicitor freely, without the risk of everything that passed being revealed to some future opponent"⁶⁰⁶. Similar protection does not arise *ex lege* with regard to communications with any other category of adviser⁶⁰⁷

⁶⁰⁴ Unreported, Queen's Bench Division (Crown Office List), 13 December 1993 (Transcript available on Lexis Nexis).

⁶⁰⁵ *Baker v Campbell* [1983] 153 Commonwealth Law Reports 52.

⁶⁰⁶ *Walkers on Evidence* para 393; cf *Ventouris v Mountain* [1991] 1 WLR 607 at 611 *per* Bingham LJ.

⁶⁰⁷ See *Walkers on Evidence* para 397; *Wheeler v Le Marchant* [1881] 17 Ch D 675.

and such contractual obligations of confidentiality as might apply between persons and such other advisers will not defeat a demand that evidence be given⁶⁰⁸.

The argument which may be put in favour of applying this somewhat complex branch of UK evidence law to a request for assistance in connection with an investigation in another European jurisdiction is that the UK rules have a public policy foundation and that to take the evidence of the witness or seize the documents or records would defeat that policy even if they were never used in evidence.

Against that, however, it may be said that the rules about privilege and non-compellability are not there to protect a person's secrets for their own sake. They do not relate to any kind of property interests. Rather, they relate specifically to the law of evidence. Moreover, the reservation in terms relates to exemptions from giving evidence, not to the protection of property rights of any kind, nor to any privilege of the witness founded on public policy. Where the UK is the requested state and a witness claims that the evidence which he is being required to give is evidence which he could not be compelled to give in the requesting state, Schedule 1 paragraph 4 to the 1990 Act requires that the evidence be taken but not transmitted if the court in the requesting state upholds the witness's claim. Rules on privilege and compellability equivalent to, and sometimes wider than, UK rules do apply in other legal systems⁶⁰⁹. The scheme provided by Schedule 1 paragraph 4 of the 1990 Act would, it is suggested, be sufficient to meet the real interests in the case. The reservation made by the UK to Article 3 places UK laws in a dominant position which is not necessary.

Article 5

Article 5 permits Parties to reserve the right to make the execution of a request for search or seizure of property dependent on double criminality, the extraditability of the offence or the consistency of execution of the request with the law of the

⁶⁰⁸ *Walkers, loc cit.*

⁶⁰⁹ See Hatchard, Huber and Vogler, *op cit*, 75, 79, 146.

requested party. As the *Explanatory Report* points out, these conditions do not apply to mutual assistance in general under the Convention⁶¹⁰. Most Parties have availed themselves of the opportunity.

The UK has selected the first and third options, so that it reserves the right to make execution of a request for search and seizure of property dependent on the satisfaction of a double criminality test and on the execution of the request being consistent with the law of the UK. The need for execution of the request to be consistent with the law of the requested state is self evident; but the double criminality requirement is of some significance. This is a requirement which, as regards mutual legal assistance, has come under some criticism in recent years. In June 1996 the P8 Lyon Summit agreed recommendations made by a Senior Expert Group on Transnational Organised Crime⁶¹¹, the third of which was that "States should, where feasible, render mutual assistance, notwithstanding the absence of dual criminality". It could, of course, be argued that such assistance without double criminality is not feasible in the case of search and seizure, because the property rights of third parties may be involved. Such a position would be understandable. However, in an EU context, the Action Plan to Combat Organized Crime urges the conclusion between the EU Member States of a Convention on Mutual Assistance in Criminal Matters which should aim at rendering superfluous the reservations to ECMA. The double criminality requirement is singled out for special attention in this respect⁶¹²

Abramovsky has described the double criminality requirement in the 1995 Russian/US MLAT as "a key deficiency" because "the elements of criminal offences in the United States and Russia do not entirely overlap. Thus corrupt enterprises operating in the United States and Russia may not fall within the purview of the Agreement if their members commit no acts specifically

⁶¹⁰ *Op cit* 15.

⁶¹¹ Dated 12 April 1996; copy on file with author.

⁶¹² Para 8(4). See also the consideration of the double criminality requirement in the context of extradition at 113 above.

criminalized within the Russian Federation"⁶¹³. A background paper for the 1994 World Ministerial Conference on Organized Transnational Crime noted, with apparent approval, that no double criminality requirement applies to search and seizure under the USA's 1988 MLAT with Thailand⁶¹⁴.

Polimeni has pointed out that the double criminality requirement can prove to be a severe obstacle to investigations in relation to the Italian offence of participation in a criminal organisation of a mafia type, an offence which has no direct equivalent in UK law or in the laws of many other European countries. That offence has, he says, been "the cornerstone" of such success as Italian anti-mafia efforts have experienced⁶¹⁵. A similar assessment of the value of such legislation was made in another background paper for the 1994 World Ministerial Conference⁶¹⁶. Yet the existence of a double criminality requirement would mean that the UK could not provide assistance by way of search to an Italian investigation focused on such an offence unless some other offence, such as money laundering, could be shown to be involved⁶¹⁷. As we shall see in considering the Harare Scheme⁶¹⁸, the retention of a double criminality requirement indicates a lack of confidence in the basis on which a treaty partner decides what conduct to penalise and how seriously to treat penalised conduct. To put it another way, it indicates a distrust of foreign criminal justice systems.

A draft of a Third Pillar Convention on mutual assistance in criminal matters is under discussion at the time of writing and a version of that draft

⁶¹³ Abraham Abramovsky, *op cit*, 209.

⁶¹⁴ *Most Effective Forms of International Co-operation for the Prevention and Control of Organized Transnational Crime at the Investigative, Prosecutorial and Judicial Levels* (UN Doc E/CONF.88/4, 1 September 1994) para 68 (copy on file with author).

⁶¹⁵ G Polimeni, *European Policy Responses to International Organized Crime*, Europa Institute, University of Edinburgh, Occasional Paper 3, 1995, 11-12.

⁶¹⁶ *National Legislation and its Adequacy to Deal with the Various Forms of Organized Transnational Crime; Appropriate Guidelines for Legislative and Other Measures to be Taken at the National Level* (UN Doc E/CONF.88/3, 25 August 1994) para 20 (copy on file with author).

⁶¹⁷ The EU has, on 19 March 1998, adopted a *Joint Action on Making it a Criminal Offence to Participate in a Criminal Organization in the Member States of the European Union*, by which the Member States undertake to criminalise participation in the activities of a criminal organisation (Council Press Release 6889/98, with text of Joint Action annexed).

⁶¹⁸ See 174 below.

appears in the Report of the House of Lords Select Committee on the subject⁶¹⁹. In that draft, the Article which would deal with double criminality is left blank. This was explained to the Committee on the basis that discussion of the issue was proceeding but that there was no immediate likelihood of proposals being put forward to remove the requirement⁶²⁰. The Committee noted that "during discussions of the draft Convention no examples have been given of co-operation not proving possible on account of dual criminality requirements and the Government sees no need for Member States to abandon requirements of dual criminality for search and seizure purposes"⁶²¹. In light of the literature reviewed above, such a position is astonishing. One could understand the UK Government taking the considered position that, notwithstanding the clear advantages which departing from the requirement would have for international co-operation against crime, the potential prejudice to innocent third parties in possession of property sought under a request for assistance is too great to dispense with a requirement which at least means that such property can only be seized for a foreign authority where it could be seized for a UK authority. Such a position would be defensible in terms of the property guarantees in Protocol 1 ECHR referred to above. But that is not the position as the Government explained it publicly to the Lords Committee.

In the event, the UK Government seems to have undergone a conversion. In its paper for the EU K4 Committee, referred to above, the UK proposes that "the EU should agree in principle on the objective of abolition of dual criminality restrictions on granting mutual legal assistance. This would be consistent with the principle of the recognition of the validity of the legal systems of EU partners"⁶²². The only restriction contemplated is the development of agreed minimum rules to ensure that requests for the use of coercive powers are proportionate. This

⁶¹⁹ House of Lords Select Committee on the European Communities, Session 1997-98, 14th Report, *Mutual Assistance in Criminal Matters* (HL Paper 72).

⁶²⁰ *Op cit*, Minutes of Evidence, at 5 (evidence of Mr G Stadlen). In the latest draft the blank has disappeared and the issue is not addressed at all.

⁶²¹ *Op cit* para 54.

⁶²² Para 23.

development might indicate a tendency to move (albeit slowly) towards trusting the criminal justice processes of other EU countries at least. Such trust is inherent in the way ECMA is formulated; but it is suggested that our consideration of the UK's reservations to ECMA indicates that it might have been lacking hitherto.

The Harare Scheme

The point has already been made that Commonwealth schemes owe a very large amount to English law, as a result of the English law heritage of almost all Commonwealth countries. This bears emphasis. Where the thinking which underlies a multilateral instrument owes a large amount to a given legal system it would be surprising if the country whose legal system that is found much to dispute in the instrument in terms of principle. It is therefore not surprising that the UK's interventions in the negotiations for the Harare Scheme related, by and large, to matters of practical detail⁶²³, with occasional comment on how far political will would support proposals (such as intimate body searches⁶²⁴). Overall, those interventions give the impression of a generally conservative approach, the tone of which was set by the UK's first intervention, in which it opposed a Jamaican attempt to move away from the Scheme approach and establish a full-blown multilateral treaty⁶²⁵. The attempt was unsuccessful and the Scheme accordingly begins, not with the creation of any obligation, but with a statement that its purpose is to increase the level and scope of assistance rendered between Commonwealth Governments in criminal matters. The kinds of assistance which it contemplates are listed, but the list is not exhaustive⁶²⁶. Most of the Scheme is

⁶²³ See, for example, Commonwealth Secretariat, *Mutual Assistance in the Administration of Justice: Meeting of Senior Officials to Consider Draft Schemes, 27 January-7 February 1986*, Summary Record, 41, where the extent to which confidentiality can be assured was under discussion and 43, on whether or not requests should be in writing.

⁶²⁴ Summary Record, 45.

⁶²⁵ Summary Record, 30.

⁶²⁶ As amended by Commonwealth Law Ministers in April 1990, the list is as follows:

"1(3) Assistance in criminal matters under this Scheme includes assistance in

- (a) identifying and locating persons;
- (b) serving documents;
- (c) examining witnesses;
- (d) search and seizure;

“nuts and bolts” stuff and need not be discussed here but it should be said that paragraph 7 permits the refusal of assistance in certain cases, which include the situation in which there is no double criminality, that in which the offence is of a political character, that in which the offence is purely military and that in which the request relates to conduct in respect of which the person accused or suspected has already been convicted or acquitted in the requested country.

There were two issues on which the negotiations shed a certain amount of light on the UK’s attitude to the relationship between the Scheme and existing UK law. The first, and more substantial of these, relates to the scope of the Scheme. It was a matter of consensus that assistance should be available in relation to “criminal matters” and that this phrase would cover the situation in which proceedings have been instituted in a criminal court. Thereafter, it was for consideration whether the phrase, and hence the scheme, also covered either or both of two other situations. These were, first, the certification by the Central Authority of the requesting state that the institution of such proceedings is contemplated and, secondly, certification by that Authority that there is “reasonable cause to believe that an offence in respect of which such proceedings could be instituted has been committed”. The UK’s position was that “it would be sensible to extend the Scheme to contemplated proceedings but not to go so far as a reasonable suspicion that an offence had been committed. Coercive powers required a firmer base than reasonable suspicion. The unwarranted search for information required safeguards which the contemplated proceedings formula would satisfy...investigatory inquiries could be handled by the existing ICPO-INTERPOL arrangements”⁶²⁷.

McClellan notes⁶²⁸ that, of the two extreme positions available, the UK

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- (e) obtaining evidence;
 - (f) facilitating the personal appearance of witnesses;
 - (g) effecting a temporary transfer of persons in custody to appear as a witness;
 - (h) obtaining production of judicial or official records; and
 - (i) tracing, seizing and confiscating the proceeds or instrumentalities of crime.

⁶²⁷ *Ibid*, 34.

⁶²⁸ David McClellan, *International Judicial Assistance*, 154.

inclined to support the Australian position, which was to make assistance available for the investigation of offences. New Zealand, on the other hand, wished to restrict assistance to cases in which proceedings had already been instituted. In light of the foregoing quotation of the UK statement of its position, however, McClean's assertion needs some qualification. Whilst it is true that the UK was willing to relax its position as set out in the Evidence (Proceedings in Other Jurisdictions) Act 1975, it was not willing to go beyond the case in which proceedings were "contemplated". The UK's position therefore remained rather restrictive. Having regard to the terms of its intervention, the UK clearly contemplated that the effect of refusing to give assistance where there is a reasonable suspicion that an offence has been committed would be to prevent the use of compulsory powers (such as search) where the identity of the perpetrator of an offence is unknown.

This would have placed searches on behalf of Commonwealth requesting states in a more restricted position than applied to the UK's own national investigations. Section 8(1) of the Police and Criminal Evidence Act 1984 provided for the issue of a search warrant where there were "reasonable grounds for believing", *inter alia*, that a serious arrestable offence had occurred⁶²⁹. In Scotland, there is Full Bench authority in the civil courts for the proposition that a search warrant may be granted competently before any person is arrested or charged⁶³⁰ and High Court authority which reaffirms the right of the procurator fiscal to obtain a search warrant to enable him to complete inquiries which he deems necessary "before he can reach a decision as to whether he should institute criminal proceedings" against a particular person⁶³¹. Indeed, in the Scottish cases, it is the phrase "reason to suspect" which recurs as the basis on which warrants have been sought⁶³² and that represents, arguably, an even more subjective state of

⁶²⁹ Although this is couched in the past tense, reflecting the state of English law at the time of the meeting under consideration, it should be said that the law remains unchanged.

⁶³⁰ *Stewart and Another v Roach* 1950 SLT 245.

⁶³¹ *MacNeill, Complainer* 1984 SLT 157, 159.

⁶³² See especially *Stewart and Another v Roach*.

mind than “reasonable grounds to suspect”.

It is to be assumed that the UK delegation, which included representatives of the Home Office, Scottish Office and Crown Office, was aware of the relevant UK law. The position adopted can, therefore, be explained only on the basis that the UK was not willing to find itself obliged (even in the limited and moral sense in which a Commonwealth Scheme involves obligation) to place in Commonwealth countries the same degree of confidence which it placed in its own police officers, procurators fiscal and courts. (It might, of course, be that such a position was fully justified in light of the underdevelopment of criminal justice systems of certain Commonwealth countries and the nature of the Governments of those countries. Nigeria, for example, was represented at the meeting). In the event, other counsels prevailed and the Scheme as adopted makes assistance available where the Central Authority of the requesting country certifies that criminal proceedings have been instituted in a court or that there is reasonable cause to believe that an offence in respect of which proceedings could be instituted has been committed.

The second matter relates to grounds for refusal of assistance. The draft did not include within those grounds any double criminality requirement but Professor McClean (who had been largely responsible for the drafting) invited the delegates to consider whether such a requirement was needed. The consensus was that it was, and paragraph 7(1) of the Scheme as adopted provides that the requested country may refuse to comply in whole or in part with a request for assistance if it appears to the Central Authority of that country to concern conduct which would not constitute an offence under the law of that country. The UK approach to this was to support the Maltese position. That country argued that, since mutual assistance might lead to deprivation of liberty, there should be a discretionary double criminality rule. “Certain states” might consider it “repugnant” to give assistance which might lead to a conviction for conduct which

was not a criminal offence in the requested state⁶³³. The UK agreed that there should be a discretion to refuse assistance on this ground, and that such a discretion “might especially be used in the case of compulsory measures which might be considered to constitute an invasion of the privacy of the individual”⁶³⁴. The example given by McClean and Menary in their explanatory note on paragraph 7(1) relates to the tendency for some countries whose criminal law is particularly influenced by religious or ideological considerations to penalise heavily conduct which is either accepted or only penalised lightly in other countries⁶³⁵.

The Scheme as adopted included the absence of double criminality as a discretionary ground of refusal and the UK’s position was, therefore, in line with that of the majority of countries. Since the application of a double criminality test necessarily applies a municipal law standard, it may be said that the fact that the UK favoured that approach is consistent with its general emphasis on municipal law; but its significance lies more in its combination with other evidence of such a preference than in its own right.

Article 7 of the 1988 UN Drugs Convention

Article 7 of the 1988 UN Drugs Convention has been described as “in itself...a mini-mutual legal assistance treaty” which “contains a comprehensive regime for mutual assistance in respect of the specific criminal law activity at which it is aimed. More simply put, drug trafficking enjoys its own specialized mutual legal assistance regime”⁶³⁶. The language of Article 7 is strikingly similar to that of free standing MLATs. It begins, for example, with the obligation to afford “the widest measure of mutual assistance in investigations, prosecutions and judicial proceedings”⁶³⁷.

⁶³³ *Summary Record*, 39.

⁶³⁴ *Ibid.*

⁶³⁵ David McClean and WJ Menary, *Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth: Further Explanatory Material Prepared for Commonwealth Jurisdictions*, Commonwealth Secretariat, 1988 Vol II, 21.

⁶³⁶ DW Sproule and Paul St-Denis, *op cit*, 285, 287.

⁶³⁷ Article 7(1).

The UK did not in fact contribute to the discussion of the draft of Article 7 during the Vienna Conference. It would be unsafe to construct any very substantial argument on the basis of the UK's silence in negotiations and consideration of Article 7 is, at this point, brief for that reason.

It does seem legitimate to conclude from the UK's silence that the draft contained nothing to cause it any significant concern. It deals with drug trafficking, which is one of the types of offence identified by the then Attorney General⁶³⁸ as those which make mutual assistance a matter of necessity. Moreover, it contains no obligation not already in contemplation as a result of the UK's participation in the Harare Scheme and decision to accede to ECMA.

Paragraph 1 has been quoted. It is of interest here not because it involves an obligation to give the widest measure of assistance but because that assistance is required to extend to investigations. The word "investigations" is not defined but its context suggests that it refers, or is capable of referring to, a point before proceedings are actually in contemplation. As noted above, the UK was reluctant to go quite that far during consideration of the Harare Scheme. If such reluctance remained, it was not voiced at the Vienna Conference. This may be explained by three factors, though which of them applied cannot be known. First, the UK had already "lost" on that issue in the Commonwealth context and was expecting to become party to ECMA, which covers the investigative stage. There would, therefore, have been little point in fighting the battle again in Vienna. Secondly, the drug trafficking context might well have made the UK less sensitive to the perceived rights of those under investigation that would have been the case in relation to other sorts of crime. The UK was prepared to take a more "draconian"⁶³⁹ approach which to the proceeds of drug trafficking than to those of other sorts of crime. And, thirdly, it might simply be that UK Government thinking had developed to the point at which it no longer had the same concerns about the investigative stage. Such development might, of course, have been

⁶³⁸ Havers, *op cit.*

influenced by involvement in negotiations such as those which led to the Harare Scheme.

To go further would be to speculate. The most we can say is that there may be grounds for thinking that the UK's developing involvement in international mutual legal assistance affected its policy on this issue.

Bilateral MLATs

In his paper on the UK's experience of treaty-making in the field of international co-operation, Harding explained that, following the enactment of DTOA and the confiscation provisions of the Criminal Justice Act 1988, and before the adoption of the 1988 UN Drugs Convention, the UK decided that bilateral agreements would be necessary to ensure reciprocity and the effective operation of confiscation as between different jurisdictions. Accordingly, the UK embarked on the negotiation of a round of bilateral agreements⁶⁴⁰. There is now a substantial number of these but almost all of them relate to the investigation of drug trafficking and/or confiscation of the proceeds of crime. Those agreements will be considered under the heading of the proceeds of crime. However, in the case of 3 countries-Canada, the USA and Thailand-there are general bilateral MLATs and aspects of those MLATs are for consideration here. There would be something to be said for full analysis of these treaties, which no-one has yet provided; but the subject of this thesis is the relationship between international law and criminal law, so that considerations of relevance and space preclude full description.

The Canadian Treaty takes the form of a 1992 Exchange of Notes, amending an earlier drug-specific treaty⁶⁴¹. The Treaty with the USA⁶⁴² is free-

⁶³⁹ The word is terribly over-used but is chosen here because it is the word which UK ministers and officials used to describe the approach to the proceeds of drug trafficking.

⁶⁴⁰ Harding, *op cit*, 239.

⁶⁴¹ Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Canada amending the Treaty on Mutual Assistance in Criminal Matters (Drug Trafficking) signed at Ottawa on 22 June 1988.

⁶⁴² Treaty between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America on Mutual Assistance in Criminal Matters 1994.

standing but followed an earlier drug-specific treaty⁶⁴³ (which itself was subsequent in time to the 1986 Treaty regarding the Cayman Islands⁶⁴⁴). Both of the earlier, drug-specific treaties contemplated the negotiation of a general MLAT to supplement or replace the drug-specific treaty⁶⁴⁵. The Treaty with Thailand⁶⁴⁶ is free-standing but both the UK and Thailand were already Party to the 1988 UN Drugs Convention. Accordingly, in the case of each of the UK's general bilateral MLATs negotiations proceeded in the context of an existing drug-specific treaty relationship, to which the UK's attitude had been conditioned by its existing municipal law in the shape of DTOA.

The 3 general MLATs all begin with the obligation to provide mutual assistance-in the case of the Canadian Treaty, "the widest measure of mutual assistance"-in criminal matters. This obligation is elaborated by a non-exhaustive list of forms of assistance. These lists are not identical.

All of the treaties include the taking of testimony from persons, the service of documents, the execution of requests for search and seizure, the transfer of persons in custody to be witnesses, the location of persons and the provision of assistance in restraint and forfeiture proceedings. The wording by which these forms of assistance are expressed varies as between the treaties but not in a way which is of any material significance for our present purpose. To these forms of assistance, the treaties with the USA and with Thailand add the provision of documents, records and evidence. The Treaty with Canada, however, gives rather more specification under this head. Under that Treaty, the parties undertake the "provision of information, documents and other records, including criminal

⁶⁴³ Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America concerning the Investigation of Drug Trafficking Offences and the Seizure and Forfeiture of Proceeds and Instrumentalities of Drug Trafficking 1988.

⁶⁴⁴ Treaty between the United States of America and the United Kingdom of Great Britain and Northern Ireland Concerning the Cayman Islands Relating to Mutual Assistance in Criminal Matters 1986.

⁶⁴⁵ Article III of the 1988 Treaty with Canada and Article 13 of the 1988 Agreement with the USA.

records, judicial records and Government records” and the “delivery of property, including lending of exhibits”⁶⁴⁷. The Canadian Treaty also seems to go further than the other 2 when it includes an obligation of “facilitating the appearance of witnesses or the assistance of persons in investigations”, in addition to the obligation to transfer persons in custody for that purpose.

It is, of course, possible that the Canadian Treaty is simply more detailed than the others; but if so it is also more detailed than the Harare Scheme and more detailed than the MLAT between Canada and the USA⁶⁴⁸. In particular, the reference to the provision of criminal records, judicial records and Government records does not occur elsewhere. It may be speculated that this is to be explained by the traditionally close relationship between the UK and Canada. That having been said, the point has no great significance for this thesis and it is not, therefore, followed further.

All 3 of the MLATs go on to provide that their provisions are not to give rise to a right on the part of a private party to obtain or exclude evidence⁶⁴⁹. The Treaties with the USA and with Thailand state plainly in this context that they are intended solely for mutual legal assistance between the Parties. This provision is important for our purpose because it is an element in what has become a widespread practice of placing a fence between the means by which evidence is gathered in a foreign jurisdiction and questions of admissibility of evidence in trial courts. The elements of that practice may be discussed conveniently here.

We begin where we are, with the exclusion in the UK’s bilateral treaties of the possibility of such treaties giving rise to rights in individuals. Such clauses in treaties were developed in US practice. US MLATs are intended to be self-executing and to operate in conjunction with the extremely short mutual legal

⁶⁴⁶ Treaty between the Government of the Kingdom of Thailand and the Government of the United Kingdom of Great Britain and Northern Ireland on Mutual Assistance in Criminal Matters 1994.

⁶⁴⁷ Article II(3)(b) and (e).

⁶⁴⁸ Treaty between the Government of the United States of America and the Government of Canada on Mutual Legal Assistance in Criminal Matters 1985.

assistance provision at 28 USC 1782⁶⁵⁰. The US Court of Appeals has held that this object has been achieved⁶⁵¹. As a result of the self-executing nature of such treaties in US law, there is a real possibility that, absent clauses such as that under discussion, individuals, whether defendants or witnesses, could litigate on the basis of treaty provisions about the assistance being given or obtained in any given case. At best, the result would be the introduction of significant delays; but embarrassing decisions from municipal courts would be another possibility. Accordingly, it became standard practice to include clauses such as this in US MLATs⁶⁵². The position of the individual was considered to be sufficiently protected by the possibility of sending letters rogatory⁶⁵³.

The protection of the individual in US law is not the subject of this thesis. It may be commented, however, that letters rogatory, whilst allowing an individual to try to gather evidence to tender in his defence, do not assist him in securing the exclusion of evidence gathered under a treaty but in a way which might, in a purely municipal context, have resulted in successful objection. A treaty clause which says, as the UK's Treaty with Canada does, that a private party is not entitled to rely on the Treaty to exclude evidence, must have the effect of closing off any argument that the Treaty was not complied with, even if a way can be found to refer to it in the absence of legislative transformation⁶⁵⁴.

Each of the treaties includes a provision as to the execution of requests. That provision, in the Treaty with Thailand, is very brief, providing only that

⁶⁴⁹ Treaty with Canada, Article II(4); Treaty with USA, Article 1(3); Treaty with Thailand, Article 1(4).

⁶⁵⁰ See, for example, Letter of Submittal relating to the Treaty on Mutual Legal Assistance between the United States of America and the Kingdom of the Netherlands, together with a related Exchange of Notes, signed at the Hague on June 12, 1981, 97th Congress, 1st Session, Treaty Doc 97-16.

⁶⁵¹ *United States v Erato* 2 F 3d 11 (2nd Cir 1993).

⁶⁵² See Technical Analysis of the Mutual Legal Assistance Treaty Between the United States of America and the United Kingdom of Great Britain and Northern Ireland Concerning the Cayman Islands, 101st Congress, 1st Session, Senate, Exec Rept No 101-8, reproduced in WC Gilmore, *Mutual Assistance in Criminal and Business Regulatory Matters*, Grotius, 1995, 298, 299.

⁶⁵³ *Ibid*, 300.

⁶⁵⁴ See further on this the consideration of section 3(9) of the Criminal Justice (International Co-operation) Act 1990 at 222 below.

“The Central Authority of the Requested Party shall promptly comply with the request or, when appropriate, shall transmit it to the authority having jurisdiction to do so. The competent authorities of the Requested Party shall execute the request to the extent permitted by their domestic laws”. The equivalent provision in the Treaty with Canada is not very much longer. It requires the central authority of the requested state to take whatever steps it considers necessary to secure the prompt execution of a request and it goes on to provide that a request is to be executed in so far as permitted by the law of the requesting state and in so far as possible in accordance with any specific requirements stated in the request. The provisions in the Canadian and Thai treaties, then, adopt a very similar approach to ECMA, as discussed above.

By contrast, the “execution of requests” provision in the US Treaty (Article 5) is long and detailed. Paragraph (1) begins by providing that “as empowered by this treaty or by national law, or in accordance with its national practice, the Requested Party shall take whatever steps it deems necessary to give effect to requests received from the Requesting Party”. The meaning of this is not altogether clear. The reference to the provision of assistance “as empowered by” the treaty may be presumed to reflect the self-executing nature of such treaties in US law, since (in light of UK dualism) the treaty does not itself empower the UK authorities to do anything. On this analysis, the reference to assistance “as empowered...by national law” would have primary reference to the UK, where the power to provide assistance is to be found in the 1990 Act. The reference to “national practice”, which follows, may refer to something in US law or may refer to informal sorts of assistance provided by law enforcement agencies outside the framework of legislation. The US Securities and Exchange Commission, for example, has developed “information sharing arrangements on a bilateral basis with various foreign authorities”⁶⁵⁵. These include a Memorandum of

⁶⁵⁵ United States Securities and Exchange Commission, *Annual Report for Fiscal Year 1992*, 20.

Understanding (MOU) with the UK Department of Trade and Industry⁶⁵⁶ which contemplates assistance in regulatory matters going beyond the recognisably criminal. It may be that arrangements of this sort are what the Treaty has in contemplation but this is very uncertain.

Whatever the precise meaning of the first sentence of paragraph (1), it can be said that it assumes a predominant position for national law. Even the self executing nature of MLATs in US law, which seems to underlie the paragraph's opening words, is derived from fundamental US domestic law. However, paragraph (1) goes on to make requirements of municipal law, by providing that "the courts of the Requested Party shall have authority to issue subpoenas, search warrants or other orders necessary to execute the request". From a UK perspective, the 1990 Act already contained such powers. Article 5(1) should, however, be read in the light of Article 8, which deals with taking testimony and producing evidence in the territory of the requested party. That Article has a very close equivalent in Article 8 of the Treaty with Thailand and the suspicion must be that the provision of the US Treaty was used as a model. The equivalent provision in the Canadian Treaty is both different and much briefer, providing only that a request may be made for the taking of evidence in the Requested State and that the Requesting State may specify questions to be put to a witness.

Article 8(1) of the Treaty with the USA provides that a person in the territory of the Requested Party from whom evidence is requested may be compelled to appear in order to testify or produce documents or other articles by subpoena or "such other method as may be permitted under the law of the Requested Party". This clearly assumes that there is a method under the law of the requested party whereby a person required to attend as a witness can be compelled to produce documents and other articles. The assumption is presumably justified in the case of US law and seems to be justified in the case of English law in terms of the venerable measure known as the *subpoena duces tecum*. Whether the

⁶⁵⁶ Reproduced in WC Gilmore, *Mutual Assistance in Criminal and Business Regulatory Matters*, 401.

assumption is justified as regards Scots law is, however, at best doubtful. It follows that the Treaty, having been made in apparent ignorance of the Scottish position⁶⁵⁷ may in this respect be difficult to comply with in the case of a witness situated in Scotland.

There is in Scots law no such thing as a *subpoena duces tecum*. The nearest equivalent is the citation of a person to produce writs or other articles of evidence during the precognition process, authority for which is given explicitly in the petition warrant by which solemn criminal proceedings are commenced⁶⁵⁸. The power to secure the presence of witnesses in relation to requests for mutual legal assistance is to be found in Schedule 1, paragraphs 1 and 2 of the 1990 Act. Paragraph 1 gives the court “the like powers for securing the attendance of witnesses...as it has for the purpose of other proceedings before the court”; and paragraph 2 empowers Scottish courts to issue a warrant to officers of law to cite witnesses. It goes on to apply section 320 of the Criminal Procedure (Scotland) Act 1975 (now consolidated in section 156 of the Criminal Procedure (Scotland) Act 1995). That provision relates to summary criminal procedure. There is no mechanism under summary procedure for requiring a witness to produce documents or other articles. The petition warrant, which is the explicit and only source of power to make such requirements under solemn procedure, is a warrant to require witnesses to attend for precognition, not to attend for proceedings before the court. Precognition is a step in investigation.

The fact that the assumption which underlies Article 8(1) of the Treaty with the USA is not justified for Scotland does not make it impossible to obtain documents and other articles for the USA. It does, however, mean that this must be done by search and seizure, which is the subject of an entirely different Article in the Treaty⁶⁵⁹. The equivalent provision in the Treaty with Thailand provides

⁶⁵⁷ There was no Scottish representation during negotiation. Channel Islands Law Officers and the writer were presented with the Treaty as a *fait accompli* at a meeting at Home Office and all protested, to no avail, that in our several legal systems there were obligations in the treaty which could not be fulfilled.

⁶⁵⁸ *Renton and Brown's Criminal Procedure*, para 12-05.

⁶⁵⁹ Article 14.

that a person summoned to give testimony or produce documents or articles may be compelled to do so “in the same manner and to the same extent as in criminal investigations, prosecutions or proceedings in the Requested Party”. This is a good deal easier to live with.

A more difficult problem which arises in the context of Article 8 of the Treaty with the USA is that of the authentication of business documents. The Treaty, it will be recalled, was signed in 1994. The UK had legislated for Scotland on the subject of the admissibility and evidential significance of business documents and copies of such documents in the Prisoners and Criminal Proceedings (Scotland) Act 1993 Schedule 3 and various forms were prescribed by Act of Adjournal. The legislation and forms are now to be found in the Criminal Procedure (Scotland) Act 1995 Schedule 8 and the Act of Adjournal (Criminal Procedure Rules) 1996⁶⁶⁰ Rule 26.1 and Forms 26.1 A and B. They are in identical terms to their originals in the 1993 Act and its associated provisions. They may be summarised (and simplified somewhat) in the following way. A copy is to be deemed a true copy and treated for evidential purposes as if it were the original if-but only if-it purports to be authenticated in the prescribed form⁶⁶¹. The form prescribed⁶⁶² requires the person granting the certification to state the capacity in which he grants it. The categories which are recognised are author, person in possession and control or authorised representative of the person in possession and control. He must go on to certify that the document is “a true copy” of the original. A statement in a business document (or authenticated copy business document) is admissible in criminal proceedings as evidence of any fact of which direct oral evidence would be admissible if three conditions are satisfied. They are, first, that the document was created or received in the course of a business, secondly that it was kept by a business and, thirdly, that the statement was made on the basis of information supplied by a person who had personal

⁶⁶⁰ SI 1996 No 513 (S47).

⁶⁶¹ Schedule 8 para 1.

⁶⁶² Form 26.1A.

knowledge of the matters dealt with in it⁶⁶³. The second of these criteria may be shown to be satisfied by the docqueting of the document in prescribed form⁶⁶⁴. The prescribed form is a certificate by an office-holder in the business that the document “is a document kept by a business, namely (*insert name and address of business...*)”. The enactment of this legislation followed detailed consideration of the issue by the Scottish Law Commission⁶⁶⁵.

Article 8(5) of the Treaty provides that documents produced pursuant to the Treaty may be authenticated in the form indicated in Appendix A to the Treaty and that “no further authentication or certification shall be necessary in order for such documentary information to be admissible in evidence in proceedings in the territory of the Requesting Party”.

Appendix A consists of a form in which a person is required on oath or affirmation before a notary public or judicial officer to “attest on penalty of criminal punishment for false statement or false attestation” that he is employed by a particular business, with a particular official title, that the record is the original or a duplicate (which is not specified) of records in the custody of a named business and, further, that the records were made at or near the time of occurrence of the matters set forth by a person with knowledge of those matters, that the records were kept in the course of a regularly conducted business activity, that the business activity made the records as a regular practice and that if any of the records is not an original it is a duplicate of the original.

Difficulties arise from the point of view of Scotland as the requesting jurisdiction. The facility for agreeing an alternative form of authentication which is provided by Article 8(5) is understood not to have been operated, so what will be delivered will be a document-probably a copy-certified in terms of Appendix A. Several difficulties will stand in the way of the admission of such a document into evidence in a Scottish criminal court.

⁶⁶³ Schedule 8 para 2(1).

⁶⁶⁴ Schedule 8 para 4.

⁶⁶⁵ Scottish Law Commission (Scot Law Com No 137) *Evidence: Report on Documentary Evidence and Proof of Undisputed Facts in Criminal Proceedings*, 1992.

First, the aspects of the Appendix A form which deal with “duplicates” of documents do not meet the requirements of Schedule 8 and the Act of Adjournal as regards authentication of copies. The Treaty form does not say whether or not what is produced is a copy. It does not state the capacity in which the certificate is granted in terms which can be recognised for the purposes of Form 26.1-A. And it merely states that the record is a “duplicate”, not that it is a true copy.

This may seem pedantic. However, copies are admissible in terms of Schedule 8 paragraph 1 *only* if they purport to be authenticated “in the prescribed form” and, although it is true that Rule 1.3 in the Act of Adjournal permits the use of a form “substantially to the same effect” as a form provided in the Rules, it would be hard to argue convincingly that a form which departs in every respect from that prescribed by the Act of Adjournal could be said to be substantially to the same effect as that prescribed.

Secondly, the aspects of the Appendix A form which deal with the admissibility of business documents fall short of what is required by Scots law. It will be recalled that, in terms of Article 8(5) of the Treaty, “no further authentication or certification shall be necessary in order for such documentary information to be admissible in evidence”. Although the Appendix A form contains statements of the matters prescribed in Form 26.1-B, and would probably satisfy the requirements of Schedule 8 paragraph 4 for a certificate that the documents produced had been kept by a business, it could not satisfy the requirement to establish that the document had been created or received in the course of a business and neither could it satisfy the requirement that the statements in the document had been made on the basis of information supplied by a person who had personal knowledge of the matters dealt with in the statement. To be sure, the Treaty certificate purports to certify things which come very close to these two criteria. However, there is in Scots municipal law no provision for these criteria to be satisfied by certificate evidence, even if it is given on oath. The oral evidence of a witness is necessary; but Article 8(5) of the Treaty, by providing that no further authentication is to be necessary for

documentary information to be admissible, might well preclude obtaining the attendance of a witness under the Treaty where the only purpose of the attendance of that witness would be to give verbal certification of matters with which the Treaty certificate purports to deal.

The provisions of what is now Schedule 8 to the Criminal Procedure (Scotland) Act 1995 and of the Act of Adjournment (Criminal Procedure Rules) were developed with care and each of their requirements is based on detailed reasoning in the Scottish Law Commission Report. The inescapable conclusion is that those who negotiated the Treaty on behalf of the UK ignored entirely what Parliament had legislated for only the previous year; and no effort has been made since the conclusion of the Treaty to amend the legislation so as to make it possible to admit in evidence in a Scottish court documentary evidence obtained under the Treaty. Moreover, the Appendix A form has been copied exactly into the Treaty with Thailand, so compounding the problem.

The proposed EU Mutual Assistance Convention

The Third Pillar Mutual Assistance Convention is, at the time of writing, still under negotiation. Substantial comment on it is, therefore, inappropriate as liable to be overtaken by developments in that negotiation. However, the UK Government has said that it attaches particular priority to the completion of the Convention⁶⁶⁶ and it clearly represents one of the most important vehicles for the future development of UK mutual assistance policy. A brief outline is, accordingly, appropriate⁶⁶⁷.

The draft proceeds on the basis that EU member States have a common interest in ensuring that mutual assistance between them is “provided in a fast and efficient manner compatible with the basic principles of their national law”⁶⁶⁸. Evidently, there is no intention to make fundamental changes in national legal

⁶⁶⁶ Memorandum by Home Office in House of Lords Select Committee on the European Communities, *Prosecuting Fraud*...92, 98.

⁶⁶⁷ This part of the thesis is based on the draft which was under discussion in March 1999.

⁶⁶⁸ Preamble.

systems. So far as it concerns the UK, it is intended to supplement ECMA⁶⁶⁹.

By Article 3, Parties would undertake to comply with formalities and procedures expressly indicated by the requesting State and this might require review of the basing of UK mutual assistance procedures on domestic procedural models⁶⁷⁰. Article 4 would permit the sending of procedural documents directly by post rather than through central authorities; within certain limits, the UK takes a relatively relaxed view of the activities of foreign law enforcement agencies in its territory⁶⁷¹ and this provision would require less of the UK than it would of certain other member States. Consistent with this, Article 5 would contemplate the direct transmission of requests for assistance from judicial authority to judicial authority. Article 9 would contemplate the taking of evidence by video conference⁶⁷².

The difficulties in completing the work are caused by Title III of the draft, which deals with the interception of telecommunications. The text is at present so far from being settled that discussion of it here is not appropriate; alternative versions of most articles exist and there are many scrutiny reservations made by states engaged in the negotiations. The importance of such interceptions is such that agreement will have to be reached (unless the Convention is to be a relatively toothless instrument) but it is too early to say what form that agreement will ultimately take. What can be said, however, is that the agreement should on any view speed up the process of mutual assistance somewhat. Given the tight time limits which characterise Scots law, that can only be an advantage.

Municipal law

There is no mechanism at common law for the provision of assistance to foreign judicial authorities or for dealing with evidence obtained in a foreign jurisdiction and which it is sought to use in the Scotland. The Criminal Justice (International Co-operation) Act 1990 provides a statutory framework for dealing with such cases. It is supplemented by section 27(2) of the Criminal Law (Consolidation)

⁶⁶⁹ Article 1.

⁶⁷⁰ See 196 below.

⁶⁷¹ But see the case of *Gross*, considered at 205 below.

(Scotland) Act 1995 (“the (Consolidation) Act”) as regards serious fraud cases and sections 272 and 273 of the Criminal Procedure (Scotland) Act 1995, which deal with evidence by letter of request or on commission and television link evidence from abroad respectively. Chapter 36 of the Act of Adjournal (Criminal Procedure Rules) 1996 makes provision as to the 1990 Act and Chapter 23 of that Act of Adjournal makes provision for letters of request in general.

The UN Manual on the Model Treaty on Mutual Assistance in Criminal Matters maintains that the optimum legislation on mutual legal assistance in criminal matters is “a general instrument that can be used to implement all mutual assistance treaties and conventions”, which mirrors the scope of the treaties “by establishing a scheme applicable to all offences included in the treaties”, which allows “for applications for different types of compulsory order that are consistent with the types of assistance listed in the treaty”, which permits applications to be made in relation to foreign matters that are at the investigation or proceeding stage” and which includes “powers for requests to be made by or through domestic authorities to a foreign state for assistance”⁶⁷³. Part I of the 1990 Act is well described by these criteria. It is a general instrument which permits the UK to offer and request assistance whether or not it has a treaty relationship with the other State concerned⁶⁷⁴. It is not supplemented by the incorporation of any treaty and so exemplifies Bennion’s first category in describing the effect of treaties in municipal law; though it is atypical in that it had more than one international arrangement in view.

We deal first with the 5 sections by which the UK is enabled to provide assistance to foreign jurisdictions. They, and their subject matter, are as follows:

<i>Section</i>	<i>Subject matter</i>
1	Service of overseas process in the UK.

⁶⁷² For the Scots law position, see 222 below.

⁶⁷³ *UN International Review of Criminal Policy*, Nos 45 and 46, 1995, 31.

⁶⁷⁴ See UK Central Authority, *International mutual assistance in criminal matters: United Kingdom Guidelines*, 1991, 4.

- 4 Obtaining evidence in the UK for use overseas.
5 Transfer of prisoner from the UK to give evidence or assist
investigation overseas.
8 Search and seizure.
9 Enforcement of overseas forfeiture orders.

These can be dealt with in three groups. Sections 4 and 8 are both concerned with the obtaining of evidence within the UK for use overseas and can be taken together quite naturally, with section 8 being treated as a special case within the scope of what is dealt with by section 4. Similarly, section 5 can be treated as an extension of one aspect of section 1, Section 9 stands alone.

Sections 4 and 8

By section 4(1), section 4 applies where 3 criteria are satisfied. The Secretary of State must have received from a country or territory outside the UK (“the requesting State”) a request for assistance in obtaining evidence in the UK. That request must be from a criminal court, a prosecuting authority or another authority which appears to have the function of making requests of the kind to which the section applies. And the request must be in connection with criminal proceedings that have been instituted or a criminal investigation that is being carried on in the requesting State.

The first of the criteria makes it clear that section 4 is triggered by a request. In this, it follows the approach of all of the general MLATs⁶⁷⁵. Circumstances could arise in which the UK authorities discovered evidence which seemed relevant to an offence which occurred within the jurisdiction of another State. Section 4 would not make it possible for them to take the initiative and simply send the material to that other State; but neither would it prevent them from telling that other State that the evidence existed, so prompting a request

⁶⁷⁵ An exception arises in the case of Article 10 of the Laundering Convention, which permits a Party, without request, to forward information to another Party where it considers that the disclosure of such information might assist that other Party in initiating or carrying out investigations.

which would bring the case within the treaties and the Act.

The second of these criteria, which restricts the categories of those to whose requests the UK can respond, emphasises the fact that mutual legal assistance, like extradition, is a transaction between States. The defence cannot, at their own hand, request the assistance of the UK. They require to persuade the court, the prosecutor or such other mutual assistance authority as exists in the requesting State (all emanations of the State) to make the request for them.

The third criterion is that the request must relate to a criminal case, in which proceedings have been instituted or in which a criminal investigation is being carried on. By making assistance available for investigations, the 1990 Act extends the facility beyond what was available under the 1964 Act. It will be recalled that the difficulties over, for example, Grand Jury proceedings in the USA and the work of the examining magistrate in countries of the civilian tradition represented a particular difficulty under that regime.

Where the section applies, the Lord Advocate, if he is satisfied that an offence under the law of the requesting state has been committed or that there are reasonable grounds for suspecting that such an offence has been committed and that proceedings have been instituted for that offence or that an investigation is being carried on there, may nominate a court to receive such of the evidence⁶⁷⁶ to which the request relates as may appear to the court to be appropriate for the purpose of giving effect to that request⁶⁷⁷. We shall review the law as to the nominated court shortly.

Section 4 was amended and extended by section 164 of the Criminal Justice and Public Order Act 1994 so as to make the special investigative powers conferred on the Lord Advocate in relation to fraud cases available for the investigation of foreign offences. The amendment was drafted with English law primarily in contemplation and then applied to Scotland. As it applies in Scotland, the 1994 Act inserted a new subsection (2B) into section 4 of the 1990 Act

⁶⁷⁶ The word "evidence" includes documents and other articles (section 4(5)).

⁶⁷⁷ Section 4(2).

whereby, if the Lord Advocate is satisfied that the same criteria which apply to nominating a court under subsection (2) are met and that the request relates to an offence which involves serious or complex fraud he may give a direction under what was section 51 of the Criminal Justice (Scotland) Act 1987, now consolidated as section 27 of the (Consolidation) Act. The making of such a direction brings into play section 28 of the (Consolidation) Act by which the Lord Advocate's nominated officer may require persons to answer questions and produce documents. By section 28(3) the sheriff is empowered to grant a search warrant in circumstances which may be summarised as being those in which a person fails to comply with a requirement made by the Lord Advocate's nominated officer or where the making of a requirement to produce material might seriously prejudice the investigation. Material recovered under this procedure on behalf of a foreign authority is required to be furnished to the Secretary of State for transmission to the requesting State⁶⁷⁸.

So far as statements are concerned, the utility of the provision is limited by section 28(5) of the (Consolidation) Act, which prevents the use of the answers given as evidence in the prosecution of the offence under investigation. The answers are only available as information. Any other rule would infringe Article 6(2) ECHR⁶⁷⁹. Where a foreign authority requires statements which are admissible in evidence, the nomination of a court in terms of section 4(2) is the appropriate vehicle for obtaining them.

Latham J pointed out in *R v Bow Street Magistrates' Court, ex p Zardari*⁶⁸⁰ that the nominated court has some discretion about what evidence it regards it as appropriate to receive; but the issue was not considered in any greater detail and the factors which should guide the exercise of that discretion were not elaborated. It was, however, made clear in *Fininvest*⁶⁸¹ that it is not for the Secretary of State

⁶⁷⁸ Criminal Law (Consolidation) (Scotland) Act 1995 s28(8).

⁶⁷⁹ See *Saunders v United Kingdom* (1997) 23 EHRR 313.

⁶⁸⁰ Unreported, Queen's Bench Divisional Court, 29 April 1998 (CO/1593/98) (Transcript available on Lexis Nexis).

⁶⁸¹ *Supra*.

to exercise any discretion as to the breadth of the request but that such considerations are for the nominated court. There seems to be no reason why that same division of responsibility should not apply in Scots law also.

The Lord Advocate is required to regard as conclusive of the matters as to which he must be satisfied a certificate issued by such authority in the requesting State as appears to him to be appropriate⁶⁸². No particular form is desiderated for such a certificate and in practice the Lord Advocate nominates a court simply on the basis of the request for assistance. In the case of a request from a Commonwealth country, paragraph 13 of the Harare Scheme stipulates that information is to be given about the proceedings where they have been commenced and that, where they have not been commenced, the Central Authority of the requesting country must state the offence which it has reasonable cause to believe to have been committed with a summary of the known facts. A somewhat similar approach is taken by Article 7(10) of the 1988 UN Drugs Convention. ECMA, on the other hand, makes no requirement about the specification of these matters and the UK has not made any reservation which would add such a requirement. The Act cannot, therefore, be fully reconciled with either of these instruments. In the case of ECMA, more is required than is contemplated by the treaty. In the case of the Commonwealth Scheme and the 1988 UN Drugs Convention, however, the requirement for a summary of the known facts suggests that the intention is to place the authorities of the requested State in a position to make their own judgement about whether there is reasonable cause to believe that an offence has been committed. The 1990 Act replaces this with a certificate. The Notes on Clauses⁶⁸³ do not explain this difference. In the case of a state with which there is a treaty relationship, one might think that it reflects the idea that, having entered into such a relationship, the UK should

⁶⁸² Section 4(4).

⁶⁸³ Copy on file with author.

assume good faith on the part of its treaty partner⁶⁸⁴. That is all very well but the 1990 Act does not require a treaty relationship. In the case of a requesting State with which such a relationship does not exist, the UK is, of course, under no obligation to provide assistance (though the level of adherence to the 1988 UN Drugs Convention means that, in relation to drugs cases, there are relatively few such states) and the Lord Advocate could avoid being required to simply accept the word of such a State that there are reasonable grounds to believe that an offence has been committed. In other cases, however, the requirement to accept a certificate as conclusive does seem to make the requirement to be satisfied of the matters specified rather redundant. Whatever the reasoning, the UK Central Authority has issued guidance on the making of requests to the UK which reflects this and states that “where the evidence is to be taken before a court, certification should be provided by the authority forwarding the request to the Central Authority to the effect that there are reasonable grounds for suspecting that an offence has been committed, and either that proceedings in respect of the offence have been instituted or that an investigation is being carried out within its jurisdiction”⁶⁸⁵.

It appears that the nomination of a court might not be irrevocable. In *Zardari*⁶⁸⁶ a request for assistance had been received from Pakistan, the Government of which country asserted that proceedings had been commenced against the applicant for judicial review. There was said by Latham J to be evidence that the assertions made by that Government for the purpose of obtaining assistance were “fraudulent” and the applicant argued that, in those circumstances, the proceedings in the UK pursuant to the request constituted an abuse of process.

In dealing with the application, Latham J analysed aspects of section 4. He said that “the wording of the subsection makes it abundantly plain that there are

⁶⁸⁴ There is, perhaps, a superficial similarity to the rule of non-inquiry in extradition proceedings, analysed in Jaques Semmelman, *op cit* but that similarity does not stand up to examination. The rule of non-inquiry binds the courts, not the executive.

⁶⁸⁵ UK Central Authority for Mutual Legal Assistance in Criminal Matters, *International mutual assistance in criminal matters: United Kingdom Guidelines*, Home Office, 1991, 7.

⁶⁸⁶ *Supra*.

two discretions and two discretions only envisaged by the subsection. One is the discretion in the Secretary of State which is expressed in the phrase: 'if he thinks fit'. The second is the discretion in the court that has been nominated to receive such of the evidence to which the request relates 'as may appear to the court to be appropriate'. As to the first of these discretions, he went on to say that it seemed "arguable that the Secretary of State's discretion is one which he is entitled to exercise, not merely by way of nomination, but also by way of retraction of that nomination, if material comes to his attention which would suggest that the conditions, which he considered were present so as to justify his nomination in the first instance, no longer exist". Since the Secretary of State was not a party to the proceedings before the Divisional Court in *Zardari*, the extent to which the Secretary of State can retract a nomination was not resolved. The application itself was for judicial review of the magistrate's decision not to hear the abuse of process argument. What Latham J said about retraction of the nomination must, therefore, be regarded as *obiter* but if it was right it would presumably mean that the Lord Advocate too can retract a nomination. Such a power would have an evident utility where there is no insistence on a treaty relationship before mutual assistance is given and hence neither general screening out of unreliable requesting States analogous to that which applies when a bilateral extradition treaty is contemplated nor treaty based dispute resolution mechanisms⁶⁸⁷.

Article 2(a) ECMA provides that assistance may be refused "if the request concerns an offence which the requested Party considers a political offence, an offence connected with a political offence, or a fiscal offence". The 1990 Act makes no provision about political offences but section 4(3) provides that, where the request relates to a fiscal offence in respect of which proceedings have not yet been instituted, the Lord Advocate is not to nominate a court unless (a) the request is from a Commonwealth country or is made pursuant to a treaty to which the UK is a party; and (b) he is satisfied that the conduct would constitute an offence of

⁶⁸⁷ Within the framework of the Council of Europe, difficulties with regard to the operation of ECMA could be raised in the Committee of Ministers. Ultimately, alleged breaches of treaty

the same or a similar nature had it occurred in the UK. This reflects the traditional reluctance to enforce foreign revenue laws, though the House of Lords made it clear in *Re State of Norway's Application (No 2)*⁶⁸⁸ that the provision of evidence in such a case is not the enforcement of the foreign law. The reference to requests pursuant to treaties reflects the fact that the Additional Protocol to ECMA precludes refusal of assistance solely on the ground that the offence is a fiscal one (so modifying Article 2(a) ECMA). As regards the Commonwealth, the Scheme does not make the fiscal nature of the offence a permitted ground of refusal.

Aspects of this were canvassed before the Divisional Court in *Fininvest*, a case which we have considered above in relation to the use made by the court of an unincorporated treaty⁶⁸⁹. On its facts, the argument was that the Secretary of State ought, in exercising his discretion⁶⁹⁰, to consider whether or not the request concerns a political offence within the meaning of Article 2(a) ECMA. The request in that case was from Italy and narrated that several prominent Italian politicians were alleged to have committed fraud on a very large scale and to have laundered some of the proceeds through London. One element of the alleged frauds involved illicit donations to a political party and it was this which gave rise to the argument that the possibility that the offence was a political one ought to have been considered. Simon Brown LJ was able to dispose of that possibility quite shortly with the observation that "I reject the applicants' basic proposition that making payments to politicians or political parties (whether by way of bribes or illicit donations to my mind matters not) constitutes political offending in any relevant sense. It is not intrinsically political, nor is it made so because the offender hopes to change policy by buying political influence, nor because the judiciary by prosecuting him hope to clean up politics. In short, none of the applicants' arguments, whether taken individually or cumulatively, begin to persuade me that the present offences are political. I just cannot see corrupt

obligations can be raised in the ICJ.

⁶⁸⁸ [1989] 1 All ER 701 (CA).

⁶⁸⁹ Page 29.

⁶⁹⁰ In that case, to refer the case to the Serious Fraud Office.

political contributors as ‘today's Garibaldis’”.

All of the foregoing matters relate to what might be called “conditions precedent” for the provision of assistance. The procedural detail for the taking of evidence by a UK court in the course of providing the assistance requested is spelled out in Schedule 1 to the Act, which is given effect by section 4(6). That Schedule operates by applying national procedure to the taking of such evidence.

The Court has “the like powers for securing the attendance of a witness for the purpose of the proceedings as it has for the purpose of other proceedings before the court”⁶⁹¹. In Scotland, the court is empowered to issue a warrant to officers of law to cite witnesses and the power to issue warrant to apprehend a witness who fails to answer a citation is applied⁶⁹². The witness is not to be compelled to give evidence which he could not be compelled to give in domestic criminal proceedings before the nominated court⁶⁹³ (so that national rules of evidence apply⁶⁹⁴), to give evidence if his doing so would be prejudicial to the security of the UK⁶⁹⁵ or to give evidence in his capacity as a servant or officer of the Crown⁶⁹⁶. In the case of an objection by the witness that his evidence could not be compelled in the requesting state, his evidence is nevertheless to be taken unless the requesting State concedes the point but not transmitted if a court in the requesting state upholds the claim⁶⁹⁷.

Chapter 36 of Act of Adjournal offers some further procedural guidance to nominated courts. Rule 36.8 regulates participation in proceedings before such a court and provides that the procurator fiscal or Crown Counsel shall participate⁶⁹⁸

⁶⁹¹ Schedule 1 para 1.

⁶⁹² Para 2.

⁶⁹³ Para 4(1)(a).

⁶⁹⁴ See *R v Bow Street Magistrates' Court ex p King and Another*, unreported, Queen's Bench Divisional Court, 8 October 1998 (CO/3489/97) (Transcript available on Lexis Nexis). For an example of English law being thus applied, see *Crown Prosecution Service on behalf of Director of Public Prosecutions for Australia v Holman, Fenwick and Willan*, unreported, Queen's Bench Divisional Court, 13 December 1993 (Transcript available on Lexis Nexis).

⁶⁹⁵ Para 4(4).

⁶⁹⁶ Para 4(5).

⁶⁹⁷ Para 4(1)(b), (2) and (3).

⁶⁹⁸ Rule 36.8(1)(a). Notwithstanding this, Crown Counsel have never done so and it is unlikely that they would.

and that the prosecutor of the requesting country may do so⁶⁹⁹. Where the request originates from current criminal proceedings, any party to or persons “with an interest in” those proceedings may attend and, with leave of the court, may participate in any hearing. On its plain wording, this would seem to permit the participation not only of prosecution and defence but also of an established *partie civile*. The limits of the expression “with an interest in” are not indicated in the rule and so it is not clear whether a pressure group, for example, could participate. Nor is it clear whether the witness cited to give evidence at the proceedings has a sufficient interest in them to participate in the sense of being represented by solicitor or counsel. However, Rule 36.8(2) requires the nominated court, in considering whether to grant leave to participate, to consider any relevant representations made by the “party making the request” under section 4(1) of the 1990 Act. Since Rule 36.8(1)(d) makes particular provision for the judge or investigating magistrate in any current criminal proceedings to participate, it might reasonably be expected that special attention would be given to his or her views on the participation of persons who are not party to the proceedings but who nevertheless claim an interest in them.

In practice it does happen from time to time that a judge from the requesting state attends and participates. The writer, as procurator fiscal, dealt with the first such request ever processed in Scotland under the 1990 Act and the sheriff, once the writer had dealt with the formalities required to get the proceedings under way, permitted the Dutch investigating judge in attendance to examine the witnesses.

The approach of the Act of Adjournal thus places a particularly co-operative gloss on Schedule 1 to the Act which, as noted above⁷⁰⁰ tends rather to give priority to municipal law. Whilst it cannot derogate from the statutory right of a witness to rely on such privilege as might exist in Scots law⁷⁰¹ it is suggested that it supports the proposition that the Lord Justice-General, Lord Justice-Clerk

⁶⁹⁹ Rule 36.8(1)(b).

⁷⁰⁰ Page 197.

and Lords Commissioners of Justiciary, in promulgating the rules, intended Scots law to provide a facility for the taking of evidence by or on behalf of foreign courts and authorities rather than representing an obstacle thereto.

Search

Section 8 deals with the more invasive procedure of search. The legislative history of the section is that the Bill as introduced made no provision for search and seizure in Scotland. Clause 7, however, did make such provision for England and Wales. Section 8 was inserted on Report in the House of Lords⁷⁰². The obvious purpose of including section 8 in the Bill was to enable the UK, within Scotland, to meet the international obligations which it proposed to accept and the obvious method to do that would have been to examine those obligations, examine existing Scots law on search and seizure and then draft legislation which would make whatever amendments were deemed necessary to Scots law to make it possible to meet those obligations. This was not, however, the approach which was taken. According to the Notes on Clauses⁷⁰³, the purpose of the amendment which introduced the clause (which was clause 7A) was said to be “to bring Scotland into line with the provisions proposed...for England and Wales”. Moreover, the approach was to make provision which had “been adapted for Scotland from Clause 7 of the Bill”. Clause 7 was said to be “based on, and ... written in terms of, the powers of entry, search and seizure contained in the Police and Criminal Evidence Act 1984.

Finnie wrote a highly critical account of what was done when what is now section 8 was introduced into the Bill⁷⁰⁴. Much of that account was concerned with the difficulties which would have been caused by clause 7 as originally drafted, which simply sought to apply Part II of PACE throughout the UK. As such, it need not concern us. He then went on to deal with the introduction of clause 7A and called attention to the fact that the Home Office Minister of State who had the

⁷⁰¹ Schedule 1 para 4(1).

⁷⁰² The Bill had been introduced in the House of Lords, so the clause was in place before the Bill went to the second House.

⁷⁰³ Copy on file with author.

handling of the Bill said of the clause only that it represented a drafting amendment, which did not alter the substance of the Bill. The Minister offered further explanation but none was required, so that the amendment went through “on the nod”.

Finnie maintained that it was “nonsense” to assert that the substance of the Bill was not altered, first because the powers of search and seizure conferred in Scotland are more extensive than those in England and Wales and secondly because, whereas section 8 simply gives the sheriff the like power to grant search warrants as he has at common law, section 7(2) gives English magistrates power to issue warrant to a constable authorising him to enter and search premises throughout the United Kingdom.

One can agree with Finnie in much of his criticism of this legislative process. We have noted already that the 1990 Act was very much a rushed piece of legislation but this is not really an acceptable excuse. It is one thing to legislate deliberately to different effect in Scotland and in England but quite another to do so inadvertently and, it would appear, without any proper consideration being given to the context in which the Scottish provisions would operate. At its heart, section 8 simply provides that the Scottish common law of search shall apply to the giving of assistance in response to letters of request. Neither the legislation nor anything in the Parliamentary progress of the Bill suggests that anyone actually thought about what that law is and considered how it relates to the various international obligations which were in contemplation. To that task, we shall turn in a moment.

First, however, we have to recall that section 4(2B) of the 1990 Act makes the serious fraud powers available for mutual assistance and that one of the powers conferred by the Lord Advocate’s nomination is a power to require the production of documents. It therefore offers, for serious fraud cases, a more streamlined mechanism than the obtaining of a search warrant from a court under section 8 of the 1990 Act.

⁷⁰⁴ Wilson Finnie, “International Co-operation...”.

The exercise of the equivalent powers, both in domestic cases and in relation to requests from foreign authorities, by the Serious Fraud Office has attracted a good deal of case law. The exercise of the Lord Advocate's powers has attracted none. The only Scottish case on these powers, *Harris, Petitioner*⁷⁰⁵ concerns the obtaining of a warrant in Scotland by the Serious Fraud Office. The SFO cases which relate to requests from foreign authorities have primarily concerned the use of search warrants and these are discussed in the context of search generally.

The scheme established by section 8 proceeds begins with the receipt by the Secretary of State of a request from either (a) a court or tribunal exercising jurisdiction in an overseas country or territory or a prosecuting authority in that country or territory; or (b) any other authority in that country or territory which appears to him to have the function of making requests for the purpose of section 8⁷⁰⁶. Since the Home Office provides the Central Authority for mutual assistance in criminal matters in the UK, requests are received by the Home Secretary. Those requests which require action in Scotland are sent on to Crown Office without further intromission at Home Office. Where such a request is received, the Lord Advocate may make a direction under the section⁷⁰⁷ and the procurator fiscal may apply to the sheriff for a warrant⁷⁰⁸. Provided 2 criteria are satisfied, the sheriff, as we have seen, is to have "the like power to grant warrant authorising entry, search and seizure by any constable as he would have at common law in respect of any offence punishable at common law in Scotland"⁷⁰⁹. The criteria are, first, that there are reasonable grounds for believing that an offence under the law of a country or territory outside the United Kingdom has been committed and, secondly, that the conduct constituting the offence would constitute an offence punishable by imprisonment if it had occurred in Scotland.

⁷⁰⁵ 1993 SCCR 881.

⁷⁰⁶ Section 8(2).

⁷⁰⁷ *Ibid.*

⁷⁰⁸ Section 8(1).

⁷⁰⁹ *Ibid.*

This raises a number of issues, the first of which is that, although the matter has not been tested in the courts, it appears that, because of the different legal context, there is a difference in the law as to the kind of direction which may be given as between Scotland and England. In England the Divisional Court, in *R v Central Criminal Court ex p Propend Finance Property Ltd and Another*⁷¹⁰, noted that the Secretary of State, under the equivalent English provision, had given the police (to whom his direction was addressed) a choice of applying for a warrant under the 1990 Act, applying for one of 2 types of search warrant under PACE or applying for a production order under PACE. The Court held that the Act places the responsibility on the Home Secretary to decide what instrument is to be used and so to direct the police.

The various PACE options are not, of course, available in Scotland, and whilst production orders are available for use in relation to foreign cases, their availability is limited to investigations into drug trafficking⁷¹¹ or, in other cases, to investigation into whether a person has benefited from the commission of an offence (the focus being on benefit rather than on the investigation of the offence as such⁷¹²).

A further difference between Scotland and England arises in the criteria as to which the judge must be satisfied before he may grant the warrant. In English law, section 7(2) makes it necessary that he should be satisfied that criminal proceedings have been commenced in the foreign jurisdiction or that a person has been arrested in the course of a criminal investigation carried on there. Since the serious fraud powers, including search warrant, are available at the stage of investigation without the need for anyone to have been arrested, they offer a means of providing assistance at an earlier stage than does section 7. In Scotland, by contrast, in order to grant a search warrant under section 8 the sheriff has only to be satisfied that there are reasonable grounds for believing that an offence has been committed in the foreign jurisdiction. It is not necessary that any person

⁷¹⁰ [1996] 2 Cr App R 26 (QBD).

⁷¹¹ Criminal Law (Consolidation) (Scotland) Act 1995 s31.

should have been arrested. This reflects the test which is applied in domestic cases but the result is that search and seizure will be available in Scotland in some cases where it would only be available in England and Wales if the serious fraud powers could be invoked.

Having regard to the fact that the Harare Scheme deliberately sets out to make assistance, including assistance by search and seizure, available where there is “reasonable cause to believe that an offence has been committed in respect of which...criminal proceedings *could be...instituted*”⁷¹³ and that the UK has not made any reservation to ECMA insisting that proceedings should have been commenced, it appears that Scots law is more consistent with the UK’s international arrangements than is English. The drafting origins of section 8 are obscure but it may be that its wording simply reflects the fact that “reasonable cause to believe that an offence has been committed” is the test applied in domestic cases.

Section 8 also sets a double criminality test. We have seen above that the UK made a reservation insisting on the satisfaction of such a test before search and seizure would be available and section 8(1)(b) reflects that. However, the test as enacted requires that the equivalent Scottish offence must be capable of being punished by imprisonment. Given the breadth of coverage of Scottish common law offences⁷¹⁴ and the imprisonability of all common law offences, it is likely that most things recognised as offences by foreign law would have a Scottish equivalent for which prison was available, so the restriction is unlikely to have very much practical effect. Nevertheless, it is there on the face of the statute and it represents a restriction which is sanctioned neither by the Harare Scheme nor by the UK’s reservation to Article 5 ECMA. That reservation simply requires that the

⁷¹² See *R v Crown Court at Southwark, ex p Bowles* [1998] 2 All ER 193 (HL).

⁷¹³ Para 3(1), emphasis added.

⁷¹⁴ As the High Court put it in *McLaughlan v Boyd* 1934 JC 19, “It would be a mistake to imagine that the criminal common law of Scotland countenances any precise and exact categorisation of the forms of conduct which amount to crime...such is not the nature or quality of the criminal law of Scotland. I need only refer to the well-known passage in the opening of Baron Hume’s

offence be one which is “punishable” under both the law of the requesting party and the law of the UK. It might well be that the requirement that the offence should be punishable with imprisonment is in the Act to achieve some equivalence to the requirement of section 7(1) that the offence by which the dual criminality requirement is satisfied in English law should be a “serious arrestable offence” in terms of PACE. That term is defined in rather technical terms by section 116 of PACE. The limitation is unsupported by the international arrangements. In the result, both Scotland and England have restrictions on search and seizure which are not consistent with the UK’s international obligations.

One may go further and argue that, even if there is a case for such a limitation in order to prevent individuals being harassed by searches in pursuit of trivial foreign offences, that object could equally well have been met by exercising the discretion to make a direction in a way which is informed by Article 8 ECHR. That Article demands respect for private and family life, home and correspondence but permits interference with that to the extent that it is necessary in a democratic society, *inter alia*, for the prevention of disorder or crime. This, of course, requires the application of a proportionality test and such a test, properly applied, should weed out the trivial.

There have been no Scottish cases about the approach which sheriffs should take to applications for search warrants under section 8 and the English cases on the subject are of relatively limited value because they proceed very much on the basis of the law set out in PACE. It was, for example, said in *ex p Propend*⁷¹⁵ that a judge who is asked to issue such a warrant is “exercising a draconian jurisdiction” and in *R v Southwark Crown Court and HM Customs and Excise, ex p Sorsky Defries*⁷¹⁶ that such a judge should “exercise great caution before granting the application”.

No doubt because it seeks to bring into play existing municipal law,

institutional work in which the broad definition of crime—a doleful or wilful offence against society in the matter of ‘violence, dishonesty, falsehood, indecency, irreligion’ is laid down”.

⁷¹⁵ *Supra*.

⁷¹⁶ [1996] COD 117.

section 8 of the 1990 Act makes no provision regulating the execution of the warrant and what may be seized under it. Here again there is a distinction between Scotland and England because in English law PACE makes detailed provision for these matters. In Scots law, the cases on the execution of search warrants have arisen principally in the context of the admissibility or otherwise of the evidence which is recovered rather than as attempts to challenge the legality of the seizure as such. By section 8(2), any evidence seized by the constable who carries out the search must be “furnished...to the Lord Advocate for transmission” to the requesting jurisdiction. No provision is made for review by a Scottish court of what has been done under the warrant or of whether the material should be so transmitted. Nor have there been any attempts to use the civil courts to prevent the transmission of seized material whereas in England civil process has been invoked on several occasions. Three of those cases offer some assistance.

In *Sorsky Defries* the Divisional Court held that material not covered by the warrant should not have been seized. The basis for this was that section 19(3) of PACE must refer to a domestic offence, which, in context, meant one committed in the requesting jurisdiction. That might be a correct construction of PACE but it is disturbing that McCowan LJ and Waller J, as late as 1996, thought that Lord Halsbury LC’s remark in 1891 that “All crime is local. The jurisdiction over the crime belongs to the country where the crime is committed”⁷¹⁷ justified this approach without qualification or further explanation.

As just stated, Scots law has dealt with the lawfulness of search primarily in the context of arguments about the admissibility of the evidence recovered. In a purely domestic case, one would refer to the general principle that once the police are lawfully on premises with a search warrant or the permission of the occupier they may take any suspicious articles they happen to see, even if these are outwith the strict terms of the warrant (or permission) but they may not search actively for articles outwith the warrant or take away articles which might on

⁷¹⁷ *Macleod v Attorney-General of New South Wales* [1891] AC 455.

further examination disclose other offences⁷¹⁸. This question arose in a mutual assistance context in *R v Bow Street Magistrates' Court and another ex p Montgomery and others*⁷¹⁹. In that case, police officers executing a serious fraud powers search warrant pursuant to a request from the USA seized a solicitor's entire computer system, which contained material not only about the "target" of the investigation but about many other clients as well. It was then transmitted, unsorted, to the requesting authority in the USA. This was one of several grounds on which the warrant was quashed.

Some consideration was given to the manner of execution of warrants and to the Secretary of State's duties as to the transmission of material in *Gross and others v Southwark Crown Court and others*⁷²⁰. In that case, the London home of the father of a man charged in the USA with deception and false accounting had been searched following a request from the USA and a direction by the Home Secretary that a search warrant should be obtained under section 7 of the 1990 Act. Much of the case turned on the detail of PACE and its associated codes, with which we are not concerned. However, there were 2 issues of more general application. The first was the presence and activities of a US law enforcement official during the search and the second was the practice of the UK Central Authority as regards the transmission of recovered material to the requesting State.

The US official was not named on the warrant as being authorised to accompany the English police officers and it was not until he was inside the house that any attempt was made to indicate who he was or why he was there. A Home Office Circular⁷²¹ offered guidance to the police on the presence of officers from the requesting State but went no further than permitting their presence as observers at the application for and execution of the warrant. The Divisional

⁷¹⁸ *HM Advocate v Turnbull* 1951 JC 96; *HM Advocate v Hepper* 1958 JC 39.

⁷¹⁹ Unreported, Queen's Bench Divisional Court, 7 April 1998 (copy Judgement on file with author)

⁷²⁰ Unreported, Queens Bench Division (Crown Office List) (CO/1759/98) 24 July 1998 (transcript available on Lexis Nexis).

⁷²¹ No 16 of 1997.

Court said that “if such a person is to be authorised to enter the premises he must be named on the warrant and if he is not then any entry by him before his status and identity has been revealed to the occupier, and the latter's permission has been given, is unlawful and...that unlawfulness taints the entire proceedings of entry”. The unlawfulness was said to be aggravated by the fact that the US official, once in the house, began to speak in terms of the father being prosecuted (for what is not clear) and to offer him immunity in return for his co-operation. It might well be that it was this conduct which predisposed the Court to insist that in future observers from the requesting State should be identified as such before gaining admission.

The search warrant having been executed, the Detective Constable who was dealing with the case told the householder that he would retain the papers for at least 48 hours after which he would deliver them to the United Kingdom Central Authority. Effectively, this was giving him time to apply to set aside the warrant. The Court was told that it is the policy of the Secretary of State to transmit the documents as early as possible but, at any rate, within five days. The Court considered that to be reasonable “in the light of the obvious purpose of the 1990 Act”. As Brooke LJ put it, the role of the Secretary of State in the statutory scheme was “that of a conduit pipe”, except where he was put on notice of the possibility of a material irregularity. He was not under any obligation to inspect the documents himself before sending them on.

Sections 1 and 5

Sections 1 and 5 of the 1990 Act deal with the service of overseas process in the UK and with the transfer of a UK prisoner to give evidence or assist an investigation overseas. These sections can be dealt with much more briefly than could sections 4 and 8, not least because they have not generated any case-law.

Article 7 ECMA provides that "The requested Party shall effect service of writs and records of judicial verdicts which are transmitted to it for this purpose by the requesting Party". Paragraph 15 of the Harare Scheme contemplates assistance by “service of documents relevant to a criminal matter arising in the

requesting country". Such assistance is also contemplated by each of the bilateral MLATs⁷²². Section 1 of the 1990 Act empowers the Secretary of State or the Lord Advocate (as the case may be) to cause the "process or document" received to be served, either by post or by police officer.

Section 1 applies where the Secretary of State receives from the requesting state "a summons or other process requiring a person to appear as defendant or attend as a witness in criminal proceedings in that country"⁷²³ or a document recording a decision of a court in that country⁷²⁴. Although Article 15(4) ECMA contemplates that requests for assistance other than the obtaining of evidence may be sent directly from judicial authority to judicial authority it has been thought convenient to deal with all requests through the Home Office as central authority. The actual operation of the section in Scotland is in the hands of the Lord Advocate.

The documents in contemplation are those which "require" a person to appear or attend. The word "requiring" is misleading. By section 1(3), service of such documents imposes no obligation in UK law to comply with such a requirement. This principle is set out in article 8 ECMA, which prohibits the imposition of a penalty on a person who fails to answer a summons to appear unless he returns voluntarily to the requesting state and is there again duly summoned. According to the Council of Europe Explanatory Report on ECMA, "the rule laid down is derived from an international custom". Although the nature of that custom is not elaborated, it may well reflect the perception (especially amongst States of the civilian tradition) that the service in their territory of a document which threatened the imposition of a penalty for lack of compliance would infringe their sovereignty.

From ECMA, the principle found its way into the Harare Scheme⁷²⁵. It also

⁷²² Article 13 of the Treaty with the USA, Article XIV of the Treaty with Canada and Article 10 of the Treaty with Thailand.

⁷²³ Section 1(1)(a).

⁷²⁴ Section 1(1)(b).

⁷²⁵ Para 15(5).

appears in the bilateral Treaty with the USA⁷²⁶ and in that with Thailand⁷²⁷ but not in the Treaty with Canada.

Section 5 of the 1990 Act provides for the transfer of a UK prisoner to give evidence or assist in an investigation overseas. Its provisions bear a close relation to Article 11 ECMA and paragraph 24 of the Harare Scheme. In particular, such transfer is made conditional upon the consent of the prisoner in question, a condition which reflects the first of four derogations in Article 11(1) ECMA. Such a condition was added to the Harare Scheme in 1990⁷²⁸ and may evidently be traced back to ECMA. The existence of the requirement for the consent of the prisoner places him in a position equivalent to that of the ordinary witness who cannot be subjected to a penalty if he chooses not to comply with a summons to attend served on him in the requested State.

Section 9

Paragraph 27(1) of the Harare Scheme provides that a request made under the Scheme may seek assistance in securing the making in the requested country of an order relating to the instrumentalities of crime or the recognition or enforcement in that country of such an order made in the requesting country. Paragraph 27(2) explains that the orders in contemplation include restraint and confiscation orders (though the word “confiscation” is used in a sense which includes what Scots law refers to as “forfeiture”). And, notwithstanding the fact that its title refers only to the *proceeds* from crime, the Laundering Convention, by Article 2(1), requires States Parties to adopt measures necessary to enable them to “confiscate instrumentalities”. In both instruments, the word “instrumentalities” is intended to refer to property used in the commission of an offence⁷²⁹.

Section 9 of the 1990 Act authorises the making of Orders in Council for the enforcement of what the headnote calls “overseas forfeiture orders” but that power was originally restricted (as regards Scotland) to drug trafficking

⁷²⁶ Article 13.

⁷²⁷ Article 10.

⁷²⁸ Para 24(5).

⁷²⁹ Laundering Convention Article 1c; Harare Scheme para 27(2)(a) and (b).

offences⁷³⁰. For those offences, it was implemented in 1991⁷³¹. The power thus created was exercised in the Criminal Justice (International Co-operation) Act 1990 (Enforcement of Overseas Forfeiture Orders) (Scotland) Order 1999⁷³² ("the Forfeiture Order"⁷³³). The Forfeiture Order came into force on 1 May 1999 and superseded the 1991 Order. It is difficult to draw any conclusion from the delay between 1995 and 1998 other than that Scottish Office regarded the matter as having a low priority. It is understood, from informal conversations with the Crown Office Fraud Unit, that no request was received during that time which would have required the regime which the Forfeiture Order creates. That, however, was fortuitous.

Section 43 of the Proceeds of Crime (Scotland) Act 1995 ("the 1995 Act") creates an Order-making power in relation to the enforcement of Scottish confiscation and forfeiture orders in foreign jurisdictions and that power was also exercised in the Forfeiture Order.

The Forfeiture Order works by applying Parts II, III and IV of the 1995 Act in relation to designated countries, subject to such modifications as are specified in its third Schedule⁷³⁴ but it requires that external forfeiture orders⁷³⁵ must be registered in the Court of Session before they are capable of being enforced under the Order⁷³⁶. Such registration requires the Court of Session to be satisfied that the external forfeiture order is in force and not subject to appeal⁷³⁷. It

⁷³⁰ For England and Wales, the 1990 Act extended the power to offences to which Part VI of the Criminal Justice Act 1988 applies—that is, to non drug cases. The 1995 Act makes provision for Scotland equivalent to that made by that Part of the 1988 for England and Wales.

⁷³¹ Criminal Justice (International Co-operation) Act 1990 (Enforcement of Overseas Forfeiture Orders) (Scotland) Order 1991 (SI 1991 No 1468 S 136).

⁷³² SI 1999 No 675 (S46).

⁷³³ At the same time, an equivalent Order was made in relation to confiscation. It is discussed below at 299.

⁷³⁴ Para 4.

⁷³⁵ By para 1, "external forfeiture order" means "an order, including any decree, direction or judgement, or any part thereof, however described, made by a court in a designated country for the forfeiture and destruction or the forfeiture and other disposal of anything in respect of which an offence to which this Order applies has been committed or which was used in connection with the commission of such an offence".

⁷³⁶ Para 5(1) and (2).

⁷³⁷ Para 5(2)(a).

must also be satisfied that, where the person against whom the order is made did not appear at the proceedings which gave rise to it, he received notice of those proceedings in sufficient time to enable him to defend them⁷³⁸. Finally, it must be of the opinion that enforcing the order in Scotland would not be contrary to the interests of justice⁷³⁹.

Paragraph 3 of the Forfeiture Order deals with the designation of countries to which the regime which the Order enacts is to apply. They fall into 2 groups. The first group consists of those countries and territories designated in part I of Schedule 1 to the Forfeiture Order but they are so designated only in relation to cases in which the external forfeiture order which it is sought to enforce has been made in respect of a drug trafficking offence⁷⁴⁰. The second group consists of those countries and territories specified in Part II of the same Schedule but they are so designated only in relation to what the Forfeiture Order calls “any other offence to which this Order applies”⁷⁴¹. This distinction between those countries and territories which can only receive assistance in relation to drug trafficking cases and those which can receive assistance in relation to a wider range of cases reflects the UK’s treaty relationships. Part I of Schedule 1 includes those countries with which the UK has a bilateral drug-specific MLAT and States Parties to the 1998 UN Drugs Convention, whilst Part II includes those countries with which the UK has a bilateral “all crimes” MLAT and States Parties to the Laundering Convention. Every country listed in Part II is also listed in Part I but the reverse is not true.

Paragraphs 6 to 11 of the Forfeiture Order provide for the proof of foreign orders in relation to the registration process, representation of the Government of the requesting State, the eventuality that the order is satisfied in the requesting country and the revocation of earlier orders. They have some interest in their own

⁷³⁸ Para 5(2)(b).

⁷³⁹ Para 5(2)(c).

⁷⁴⁰ Para 3(1)(a). The expression “drug trafficking offence” is defined by reference to section 49(5) of the 1995 Act.

⁷⁴¹ Para 3 (1)(b).

right but their nature is essentially technical and much of their content is, strictly, civil procedure. Lack of space and the need to focus on the relationship between international law and criminal law prevents their fuller consideration here. We pass, therefore, to Schedule 3, which modifies those Parts of the 1995 Act which are applied to the designated countries.

Part II of the 1995 Act provides a comprehensive general forfeiture regime in respect of prosecutions which take place in Scotland and the central feature of the scheme is the suspended forfeiture order, which is introduced by section 21. In order to make sense of the modifications made by the Forfeiture Order, a brief account of the statutory scheme which applies in domestic cases, and which is being modified, will be helpful.

By section 21 of the unmodified 1995 Act, a suspended forfeiture order is available where, in respect of any offence, the accused is convicted (whether in solemn or summary proceedings) or where in summary proceedings he is discharged absolutely. The prosecutor can ask for an order under solemn procedure upon moving for sentence and under summary procedure upon the conviction of the accused. At that time he must tell the court of the identity of any person whom he knows or reasonably suspects to have an interest in the property. Before making the order the court must be "satisfied" (the Act does not say to what standard) that "property which was at the time of the offence or of the accused's apprehension in his ownership or possession or under his control-(a) has been used for the purpose of committing, or facilitating the commission of, any offence; or (b) was intended to be used for that purpose".

The first effect of the making of a suspended forfeiture order is that the property is taken into the possession of or placed under the control of the clerk of court until either the order is recalled or the property is forfeited and disposed of. The prosecutor must intimate the making of the order immediately in writing to any person named in the order as someone thought to have an interest in the property and must notify that person that he may be entitled to apply for the order to be recalled. If the property includes heritage the prosecutor must cause a

certified copy of the order to be recorded in the General Register of Sasines or Land Register of Scotland. In addition, if the court directs, the prosecutor must insert notice of the order in the Edinburgh Gazette or other publication.

In most cases, the property is perishable, dangerous, worthless or intrinsically pernicious (in the sense that its mere possession is unlawful). Where the prosecutor certifies that such is the case it is, by section 24, forfeited immediately after the making of the suspended forfeiture order. In other cases, forfeiture takes effect only after the passage of a period of time. Forfeiture takes effect in the case of heritable property six months after the copy of the suspended forfeiture order is registered and in the case of moveable property 60 days after the making of the suspended forfeiture order. This delay allows an opportunity for a third party having an interest in the property to vindicate that interest and secure the recall of the order, as provided for by section 25.

Underlying the introduction of the suspended forfeiture order was the need to make proper provision for the protection of *bona fide* third party interests in property found liable to forfeiture as having been used or intended to be used for the commission of an offence. That policy objective is retained in the modification of section 21 of the 1995 Act by the Forfeiture Order⁷⁴². Most of the section is omitted, as relating purely to the means by which the suspended forfeiture order is obtained in a domestic prosecution. However, new subsections (10) and (11) are substituted. By subsection (10), as soon as may be after an external forfeiture order has been registered, the Lord Advocate is required to notify in writing any person named in the order (other than the person in respect of whom the order has been made) who is the owner of or otherwise has an interest in, the property to which the external forfeiture order relates⁷⁴³. If the property in respect of which the order has been made includes heritable property in Scotland, he is to cause a certified copy of the order to be registered in the General Register of Sasines or the Land Register for Scotland (as the case may

⁷⁴² Schedule 3 para 2.

⁷⁴³ Subsection (10)(a).

be)⁷⁴⁴. And, if directed to do so by the Court of Session, he must insert a notice in the Edinburgh Gazette or such other publication as seems to the Court to be appropriate, specifying the terms of the external forfeiture order⁷⁴⁵.

These requirements mirror those which are made by subsection (10) of the unmodified Act for domestic cases. Their purpose is to permit the third party who claims an interest in property an opportunity to vindicate that interest; and section 25, together with parts of section 24 make particular provision for that third party's remedy. Section 24 has the principal purpose, however, of giving effect to the order for forfeiture.

Some of the modifications made to section 24 by the Forfeiture Order are merely consequential; so, for example, in subsection (1) the phrase "a suspended forfeiture order" becomes "an external forfeiture order"⁷⁴⁶. Such consequential amendments do not require to be considered here. There is, however, one more substantive modification, and it substitutes a new subsection (3).

In the unmodified Act, subsection (3) provides that, if an application for recall or variation of a suspended forfeiture order is made, the property is not to be forfeited until the application is finally disposed of in favour of the prosecutor or the overall time limit applicable to suspended forfeiture orders expires, whichever is later. Applications for recall or variation are dealt with by section 25 and here the Forfeiture Order substitutes a completely new section⁷⁴⁷ (though one which is closely related to what it replaces).

By section 25(1) as modified, the High Court shall, on an application being made to it by a person other than the accused, order that property shall not be forfeited if either subsection (2) or subsection(3) applies. Subsection (2) applies where the Court is satisfied by the applicant on the balance of probabilities that he is the owner of the property or otherwise has an interest in it and it is not satisfied by the Lord Advocate that the applicant knew or ought to have known

⁷⁴⁴ Subsection (10)(b).

⁷⁴⁵ Subsection (10)(c).

⁷⁴⁶ Schedule 3 para 4(a).

⁷⁴⁷ Schedule 3 para 5.

that the property was intended to be used for the commission of the offence and did not take reasonable steps to prevent that use or, where he acquired his interest after the offence, knew or ought to have known that it had been so used. Subsection (3) applies where the Lord Advocate succeeds in satisfying the High Court of what may broadly be called the bad faith of the applicant as specified in subsection (2) but it nevertheless appears to the High Court that forfeiture of the property would be excessive or inappropriate.

It may fairly be said that the Forfeiture Order takes the regime which applies to domestic cases and makes the minimum of modification so that the same regime can be applied to international assistance.

Outgoing requests

Section 2 of the 1990 Act makes provision for the service of UK process overseas. As it applies to Scotland, it makes it possible for “any document which may competently be served on an accused person or on any person who may give evidence in criminal proceedings”⁷⁴⁸ to be served outside the United Kingdom “in accordance with arrangements made by the Secretary of State”⁷⁴⁹. This takes the maximum possible advantage of paragraph 15 of the Harare Scheme, which permits service of “documents relevant to a criminal matter”. Its relationship with Article 7 ECMA, which provides that “the requested Party shall effect service of writs and records of judicial verdicts which are transmitted to it for this purpose by the requesting Party”, is, however, of some interest.

Since the word “writs” is not defined in ECMA one must wonder whether some of the documents which are served on the accused in the course of Scottish criminal procedure are really within the contemplation of the Treaty. Section 258 of the Criminal Procedure (Scotland) Act 1995 permits a party to criminal proceedings to serve on the other party a statement of uncontroversial evidence, failure to challenge which means that the facts set out therein are deemed to be conclusively proved. Section 280 of the same Act permits service of a wide range

⁷⁴⁸ Subsection (2).

⁷⁴⁹ Subsection (1).

of expert reports, failure to challenge which means that they are to be treated as sufficient evidence of the matters with which they deal. The question whether such documents are within the ambit of Article 7 ECMA may yet come to be of importance in the courts because of the requirement of section 2(1) that service outside the UK is to be "in accordance with arrangements made by the Secretary of State". Although ECMA has not undergone legislative transformation an appeal to it must be required if it becomes necessary to determine whether a particular document is indeed within the scope of the arrangements made. This is not precisely a matter of statutory ambiguity such as to permit an appeal to the treaty within the meaning of *Salomon*. It is more a matter of legislation by reference to the international arrangements; but perhaps the point is too obscure to be likely to be taken at any early date, especially because it could only arise in the somewhat unlikely case of an accused person who was outside the UK even after proceedings had been commenced.

Subsections (3) and (4) are directly influenced by Article 8 ECMA and paragraph 15(5) of the Harare Scheme, both of which prohibit the imposition of penalties in the requesting state on a person who does not comply with a requirement to attend served on him in the requested state. Subsection (3) provides in terms that process served outside the UK does not give rise to any obligation of compliance and precludes the imposition of a penalty for non-compliance, while subsection (4) qualifies that by preserving the position where the process in question is subsequently served on the person within the UK.

Supplementary provision is made by Chapter 36 of the Act of Adjournal (Criminal Procedure Rules) 1996⁷⁵⁰. Rule 36.3 permits the service of a document to be proved by a certificate given by or on behalf of the Secretary of State. It is accordingly possible for the UK Central Authority, having had confirmation from the relevant foreign authority that the document has been served, to certify that fact, so avoiding the need to get from a foreign authority an execution of service in any particular form. Article 7 ECMA and Article 15(4) of the Harare Scheme

provide for the giving of certificates of service so providing the Secretary of State with a basis upon which to give certification in terms of section 2.

There are 2 statutory regimes by which a request may be made from Scotland to a foreign jurisdiction for assistance in obtaining evidence. The older of the 2 is presently consolidated in section 272 of the Criminal Procedure (Scotland) Act 1995. So far as relevant⁷⁵¹, subsection (1) provides that: “in any criminal proceedings in the High Court or the sheriff court the prosecutor or the defence may, at an appropriate time, apply to a judge of the court in which the trial is to take place (or, if that is not yet known, to a judge of the High Court) for “the issue of a letter of request to a court, or tribunal, exercising jurisdiction in a country or territory outside the United Kingdom...for the examination of a witness resident in that country or territory”. This, and its associated procedure, is in several ways inadequate and it is not used in practice.

Firstly, the procedure is only available once proceedings have been commenced. We have seen above the importance of mutual assistance at the stage of investigation. Secondly, it relates only to the examination of witnesses, not to the obtaining of documents and the like. Thirdly, by subsection (3), the request can only be issued if there would be no unfairness to the other party if the evidence were received in the form of a record of the examination. In *Muirhead v HM Advocate*⁷⁵² it was pointed out that it is likely to be very difficult to satisfy that test, where the effect will be to deprive parties of the opportunity of cross-examining witnesses who give evidence of any importance. And, finally, section 272 is supported and supplemented by a hopelessly inappropriate form and procedural regime in Chapter 23 of the Act of Adjournal (Criminal Procedure Rules) 1996.

The form is Form 23.1-C. It is drawn from the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Cases 1968. It requires that

⁷⁵⁰ SI 1996 No 513 (S47).

⁷⁵¹ The section deals also with the taking of evidence on commission within the UK, the Channel Islands or the Isle of Man.

⁷⁵² *Supra*.

the nature and purpose of the proceedings should be specified, as though in a criminal case that was not obvious. It makes no provision for the relevant law to be summarised, notwithstanding the importance of that under most mutual assistance arrangements⁷⁵³. It requires that information be given about who will bear the expenses of the procedure, notwithstanding the general practice in mutual assistance arrangements that costs are to be borne by the requested party⁷⁵⁴. And it gives no assurance of reciprocity. The Rules require that the letter of request should be sent to the Secretary of State for Foreign and Commonwealth Affairs for onward transmission⁷⁵⁵, notwithstanding the fact that Article 15 ECMA, for example, clearly contemplated that ministries of justice are to provide the channel of communication and that in emergencies judicial authorities can transmit requests directly to one another, through Interpol if they desire and notwithstanding also the clear requirement of the Harare Scheme for the designation of a Central Authority through which requests are to be transmitted⁷⁵⁶. In the UK, that Authority is at the Home Office.

It is clear that the section 272 procedure is modelled on what was appropriate for civil procedure. It was never very appropriate and was not used by the Crown Office after *Muirhead*. That it should remain in force nearly a decade after accession to ECMA and the passing of the 1990 Act is, at best, an anachronism. Until the coming into force of the 1990 Act, the Crown Office was sending Commissions Rogatoire on the basis of international comity and by the diplomatic channel. Their form was one which had developed over a number of years as experience was gained in anticipating the issues which foreign authorities would need to have addressed.

Section 273 of the Criminal Procedure (Scotland) Act 1995 makes it competent to take evidence by live television link from a place outside the UK. The procedure is derived from that specified in section 272. By section 273(2), the

⁷⁵³ United Nations Model Treaty on Mutual Assistance in Criminal Matters 1990 art 5.

⁷⁵⁴ United Nations Model Treaty on Mutual Assistance in Criminal Matters 1990 art 19.

⁷⁵⁵ Rule 23.4(1).

⁷⁵⁶ Para 4.

prosecutor or the defence may apply to the court for the issue of a letter of request requesting assistance in facilitating the giving of evidence through a live television link. Such an application may be granted if the judge is satisfied, *inter alia*, that the granting of an application made by the prosecutor is not unfair to the accused⁷⁵⁷. This, it will be noted, is slightly different from the provision in section 272 which requires that the issue of the letter should not be unfair to the other party, whoever seeks it. Section 273 follows the section 272 model in that it requires the decision to be taken about potential unfairness before the request is issued. It is therefore subject to the same difficulty of application. One would have thought that, since the evidence is “live”, its fairness could have been left to the control of the trial judge just as if the witness had been in the witness box of the court.

Section 3 of the 1990 Act provides a more generally appropriate framework for the making of requests to foreign jurisdictions for evidence for use within the UK. So far as applicable to Scotland, by subsection (1) where, on an application made by the prosecuting authority or (where proceedings have been commenced) by the accused, it appears to a sheriff or a judge that an offence has been committed or that there are reasonable grounds for suspecting that an offence has been committed and that proceedings have been instituted or that the offence is being investigated, he may issue a letter of request, requesting assistance in obtaining outside the UK such evidence as is specified in the letter for use in the proceedings or investigation. A letter of request issued by the court under this power is, by subsection (4), required to be sent to the Secretary of State for transmission but in cases of urgency subsection (5) permits the sending of the letter directly to the foreign court. Supplementary provision, of a purely domestic procedural kind, is made by the 1996 Criminal Procedure Rules. However, a different form is provided from that which is given for section 272 of the Criminal Procedure (Scotland) Act 1995. It is Form 36.4-B and it was drafted (by the present writer) explicitly for the purpose of implementing ECMA and in light of

⁷⁵⁷ Section 273(3)(b).

the experience of the Crown Office in sending commissions rogatoires on the basis of comity. Its content is very close to what was being sent out before the 1990 Act came into force. It is not derived to any extent from Form 23.1-C.

Naturally, the writer regards Form 36.4-B as superior in every way to Form 23.1-C. It is difficult for him to analyse Form 36.4-B with appropriate critical objectivity. It has not, however, given any problems in practice and that encourages him to believe that his satisfaction with his work might be justified. If so, the critical difference is this, that Form 36.4-B was drafted on the basis of practical experience of the operation of mutual assistance and specifically in light of a treaty (ECMA) which deals with mutual assistance in criminal matters. Form 23.1-C was drafted at a time when such experience was not readily available (because such work was not centralised within Crown Office in the way it was in 1990) and when the only judicial assistance treaty to which the UK was party related to civil and commercial law. The draftsman of Form 23.1-C is not to be criticised for the content of that form, albeit it is inappropriate. Rather, criticism is made of Scottish Office and the High Court judiciary for leaving in place section 272 and Form 23.1-C respectively even through the 1995 consolidation of Scottish criminal procedure law.

The procedure set out in section 3(1) and (2) of the 1990 Act and described above is in practice that which is invoked by the accused. Prosecutors routinely take advantage of subsection (3), which allows a prosecuting authority designated for the purpose by an order made by the Secretary of State to issue a letter of request itself if it is satisfied of the matters specified in subsection (1)(a) (that is, that an offence has been committed or that there are reasonable grounds for suspecting that an offence has been committed) and that the offence is being investigated or that the authority has instituted proceedings in respect of it. The designated prosecuting authorities include the Lord Advocate and any procurator fiscal⁷⁵⁸. In practice, all Scottish prosecution requests are routed through (and

⁷⁵⁸ Criminal Justice (International Co-operation) Act 1990 (Designation of Prosecuting Authorities) Order 1991 (SI 1991 No 1224).

drafted by) the Crown Office Fraud and Specialist Services Unit and take the form desiderated in Form 36.4-B.

Experience in getting assistance by means of outgoing letters of request varies. The Scottish criminal justice system works on a much shorter timescale than almost any other, especially where the accused is in custody, and answers to requests are not always received within the time limits imposed by section 65 of the Criminal Procedure (Scotland) Act 1995, even where those time limits are spelled out in the request. Where possible, the precognition of complex cases, including those with a foreign element, is carried out without actually commencing proceedings, so that the time limits do not begin to run.

Delays are experienced by English prosecutors too⁷⁵⁹. One such delay gave rise to the circumstances considered by the Divisional Court in *R v Central Criminal Court and Another ex parte Hunt and Another*⁷⁶⁰. In that case a letter of request had been issued and sent to Switzerland in 1992 but not completely executed. By 1995, 2 of the accused in connection with whom it had been sent had been convicted but others were fugitives. The Swiss authorities wanted to know what the attitude of the English court was to the desire of the prosecuting authorities to secure additional material under the request. The Divisional Court declined to say, holding that the request was with the Swiss and it was for them to decide what they were going to do about it.

Section 3 of the 1990 Act does not only regulate the sending of letters of request. Subsections (7) and (9) also make some provision about the handling of evidence received in response.

Subsection (7) is the longer of the 2 sections. Its effect is to prohibit the use of evidence received from a foreign authority other than in connection with the purpose specified in the letter of request, so meeting common concerns that what was properly provided in connection with one set of criminal proceedings

⁷⁵⁹See the comments of HM Customs and Excise and the Director of the Serious Fraud Office in House of Lords Select Committee on the European Communities, *Prosecuting Fraud...*, 31 and 36 respectively.

⁷⁶⁰ The Times, 21 February 1995 (full transcript available on Lexis Nexis).

might, once in the hands of the authorities of the requesting State, come to be used for another purpose for which the requested State would not have wished to provide them. This rule, which is the mutual assistance equivalent of the rule of specialty in extradition proceedings, is set out explicitly in Article 8 of the UN Model Treaty.

Subsection (9) is, however, potentially of greater significance. It provides that “in Scotland, evidence obtained by virtue of a letter of request shall, without being sworn to by witnesses, be received in evidence in so far as that can be done without unfairness to either party.

This differs from section 272 of the 1995 Act in that section 272(3) applies a fairness test before the letter of request can be issued, whereas section 3(9) of the 1990 Act applies that test only after the evidence sought has been received. The court is therefore in a position to make a much more informed assessment of the likelihood of unfairness.

It is, however, unclear how section 3(9) is intended to interact with section 259 of the Criminal Procedure (Scotland) Act 1995.

Section 259 codifies the statutory exceptions to the general rule that hearsay is inadmissible. The section works by making evidence of a statement made by a person otherwise than while giving oral evidence admissible provided that the judge is satisfied of certain things⁷⁶¹, the first of which is that the person who made the statement will not give evidence in the proceedings for one of the reasons specified in section 259(2). The second of those reasons is that the person who made the statement “is named and otherwise sufficiently identified, but is outwith the United Kingdom and it is not reasonably practicable to secure his attendance at the trial or to obtain his evidence in any other competent manner”⁷⁶².

Clearly, it is not reasonably practicable to secure the attendance at trial of a person who has been cited in a foreign jurisdiction but who takes advantage of the fact that such citation carries no *compulsitor* to decline to attend. As to

⁷⁶¹ Section 259(1).

⁷⁶² Section 259(2)(b).

securing evidence in any other competent manner, one would require to exclude the possibility of live television link as contemplated by section 273 of the Criminal Procedure (Scotland) Act 1995. That might be done quite easily because it is understood that relatively few countries have provisions in place which would allow them to provide evidence by such a link. It will, therefore, quite often be possible to lead the evidence of the results of a letter of request under section 259 of the 1995 Act. The possibility which arises, because insufficient steps have been taken to secure coherence between the 1990 Act and the 1995 Act, is that, even if the particular criteria set out in section 259 are not satisfied, the court could permit the evidence to be tendered in terms of section 3(9) of the 1990 Act.

This brings us to the general question of the admissibility of evidence obtained by letter of request and to what Gane and Mackarel have called “process laundering”⁷⁶³. What they have in mind is the situation in which there is irregularity in the requested state in the obtaining of the evidence and the question of admissibility which faces the court in the requesting state when that evidence is tendered. They survey the case law of a wide range of common law jurisdictions and note a trend whereby such irregularities are not given any effect in the question whether or not to admit the evidence at trial. They argue for a “double admissibility” test under which the evidence would have to be admissible in both the requested and the requesting state before it could be tendered.

The only case in which the Scottish courts have come anywhere close to addressing this issue is *Torres v HM Advocate*⁷⁶⁴, in which the High Court of Justiciary had to consider the approach to be taken by a Scottish criminal court to evidence obtained by search in Canada. It was argued for the appellant, without reference to either the MLAT or the Harare Scheme, that the approach which a Scottish court would adopt in regard to articles recovered by means of an official

⁷⁶³ C Gane and M Mackarel, “The Admissibility of Evidence...”. For a further consideration of the issue by the same authors, see Mark Mackarel and Christopher Gane, “Admitting Irregularly or Illegally Obtained evidence from Abroad into Criminal Proceedings-A Common Law Approach” [1997] Crim LR 720.

⁷⁶⁴ 1997 SCCR 491.

search in this country should also apply in the case of articles recovered by means of such a search abroad. The Crown argued that, out of considerations of comity and because of the difficulties of proving the content of foreign law, Scottish courts should not investigate the legality of the actions of foreign authorities.

The facts in *Torres* were not complex. Bales of cocaine were transported by a ship, of which *Torres* was the captain, to a point off the coast of Sutherland. There they were landed by dinghy and loaded into a van, which was intercepted on the main road south. Persons in the van were arrested and prosecuted. Some time later, and in an action which was apparently unconnected with the Scottish case, the ship was searched and seized in Halifax, Nova Scotia by Canadian Customs, who arrested *Torres*. A Nova Scotia JP granted a warrant permitting officers of the Royal Canadian Mounted Police ("RCMP") to search the ship for articles which included cannabis resin and documents. The search took place and documents were seized and placed in an RCMP vault. Less than a month later, an RCMP officer became aware of a request from Scotland for evidence in connection with the prosecution of the men arrested on the A9. That officer obtained a warrant which permitted him to go into the vault and recover navigational charts and shell casings but which did not make reference to the seizure of other items which might be relevant to proof. Notwithstanding that, a hand-written note was removed from the vault. A Canadian court subsequently authorised the transmission to Scotland of a number of items, including the hand-written note which in due course was to make a considerable contribution to the Crown case against *Torres* (who was extradited from Canada to Scotland).

The argument for *Torres* on appeal was that there was no evidence that the removal of the note from the ship to the RCMP vault had been lawful and no evidence that its removal from the vault pursuant to the Scottish request for assistance had been lawful. The absence from the warrant to enter the RCMP vault of reference to anything beyond charts and shell cases meant that the removal of the note was *prima facie* irregular. The *onus* is on the Crown to show that irregularities should be excused. A departure from the terms of the foreign

warrant could only be justified by evidence of the foreign law and practice. In the absence in *Torres* of such evidence the material recovered by the search should not have been admitted in evidence.

The Crown invoked the extradition analogy, arguing that in *Sinclair v HM Advocate*⁷⁶⁵ the High Court had declined to enter into the question of the regularity of proceedings in Portugal which had led to the arrest and imprisonment there of a person wanted on warrant in Scotland. It was further argued for the Crown that, even if the Court was prepared to consider what had happened in Canada, no illegality had been established by the appellant, upon whom the onus lay, and that even if there had been an irregularity of procedure it should be excused. The Crown's position, it should be said, was a moderate one, involving the concession that matters would be different if there had been an irregularity in which the Canadian and Scottish authorities had colluded.

The High Court noted that a Canadian court had authorised the transmission of the hand-written note to Scotland. Whilst the Lord Justice-Clerk, who delivered the opinion, said that in a case which raised a question whether the appellant had been denied a right of any kind the approach in *Sinclair* might have to be reconsidered, that did not arise in *Torres*. Moreover, it was said that the removal of the hand-written note from the vault was not irregular, except perhaps in the most technical sense. Accordingly, this ground of appeal failed.

Torres was, perhaps, unusual in that the Canadian court had specifically authorised the transmission to Scotland of the item in dispute, and that after it had been recovered under the purported authority of the warrant. In many legal systems, including that of Scotland, the court is empowered to grant a search warrant to assist a foreign investigation but does not review the result of the search. It seems from what was said in *Torres* that, where the foreign court has not reviewed the results of the search, the High Court might be prepared to consider allegations of irregularity; but *Torres* does not resolve the question of onus in relation to such allegations.

Some assistance may be gained from the rather fuller consideration of the issues made in light of Article 8 of the Canadian Charter of Rights and Freedoms 1982 by the Canadian Supreme Court in *Attorney General of Canada v Schreiber and Attorney General of Quebec*⁷⁶⁶.

Article 8 of the Charter provides that “everyone has the right to be secure against unreasonable search or seizure”. The facts of the case were that a letter of request was sent to Switzerland in connection with a Canadian criminal investigation. The Swiss government accepted the letter of request and ordered the seizure of documents and records relating to bank accounts maintained in Switzerland by the respondent, who was a Canadian citizen and who divided his time between Canada and Europe. Prior to the issue of the letter of request, no search warrant or other judicial authorisation had been obtained in Canada. The decision of the Federal Court which was brought under review was one which required Canadian domestic standards for the issue of a search warrant to be met before the Minister of Justice submitted a letter of request seeking search in a foreign jurisdiction.

In *Terry v R (Attorney General of Canada intervening)*⁷⁶⁷ the appellant had been arrested in the USA pursuant to a Canadian request for his extradition to face a charge of murder. At the request of the Canadian police, the US police interviewed him, giving him a warning about his rights, which satisfied US law but which did not go as far as would have been required by the Canadian Charter of Rights and Freedoms. Nevertheless, the Court held that the evidence of the criminative statement which he made under interview had been properly admitted, basing its decision, quite reasonably, on the impossibility of expecting foreign police officers to apply Canadian law. The same reasoning was applied in *R v Harrier*⁷⁶⁸ in relation to a statement made by a Canadian accused to US Immigration officials. In *Schreiber*, Lamer CJ distinguished *Terry* and *Harrier* on

⁷⁶⁵ (1890) 2 White 481.

⁷⁶⁶ [1998] 1 SCR 841.

⁷⁶⁷ [1996] 3 LRC 16.

⁷⁶⁸ [1995] 3 SCR 562.

the basis that both of those cases concerned actions by foreign authorities who could not be expected to know and comply with the laws of Canada⁷⁶⁹. In the instant case, however, what was at issue was the action of the Canadian authorities in preparing and sending the letter of request. They, he said, “fall squarely within the purview of ...the *Charter*, as an arm of the executive branch, or the “government of Canada”. Moreover, because they are Canadian, there is no reason to be concerned with comity. They can be expected to have knowledge of Canadian law, including the Constitution, and it is not unreasonable to require that they follow it. This is especially true for officials who perform functions in the name of the Attorney General, who may indeed have additional responsibilities that flow from the special nature of that office”⁷⁷⁰. If we were to translate that into a Scottish context, we would have the unexceptionable proposition that members of the Procurator Fiscal Service, acting under the authority of the Lord Advocate are expected to act lawfully in terms of Scots law. That would now include a requirement to act compatibly with the Convention rights. It is suggested that there can be no doubt that the sending of a letter of request by or on behalf of the Lord Advocate is an act of a member of the Scottish Executive for the purposes of section 57(2) of the Scotland Act 1998 and will (once it enters force) be a relevant act for the purposes of section 6 of the Human Rights Act 1998.

In the Chief Justice’s analysis, the point in *Schreiber* could be determined on the basis of the preliminary issue, which was whether the respondent had a reasonable expectation of privacy in his banking records in Switzerland. Following *Hunter v Southam Inc*⁷⁷¹, the reasonableness of a search had to be measured by balancing the state’s interest in law enforcement against the individual’s interest in privacy. In terms of Article 8 ECHR, one would express this concept by saying that there is a right to respect for private life and correspondence⁷⁷², which cannot lawfully be interfered with by a public authority

⁷⁶⁹At 852, para 16.

⁷⁷⁰*Loc cit.*

⁷⁷¹[1984] 2 SCR 145.

⁷⁷²Article 8(1).

except in accordance with law and where it is necessary for (*inter alia*) the prevention of crime or the protection of the rights of others⁷⁷³. Before the Article 8 guarantee is engaged, one must determine whether the records relating to a bank account held in a foreign state are within the ambit of Article 8(1).

In *Schreiber*, the Chief Justice took the view that expectations of privacy must necessarily vary with their context⁷⁷⁴ and upon the nature of the activity which brings the individual into contact with the state⁷⁷⁵. Personal financial records at a bank are material in relation to which there would ordinarily be a reasonable expectation of privacy but, following *Terry*, it was of critical importance that the records were located in Switzerland and obtained in a manner consistent with Swiss law⁷⁷⁶. It might fairly be assumed that a person who decides to conduct financial affairs and keep records in a foreign state has made an informed choice. If he is reasonably prudent, he will have taken into account the state of the prevailing bank secrecy laws in deciding where to conduct his or her affairs⁷⁷⁷. "In other words", the Chief Justice said, "a person who has property or records in a foreign state runs the risk that a search will be carried out in accordance with the laws of that state"⁷⁷⁸ and a search carried out by foreign authorities, in a foreign country, in accordance with foreign law, does not infringe on a person's reasonable expectation of privacy, as he or she cannot reasonably expect more privacy than he or she is entitled to under foreign law⁷⁷⁹. Section 8 of the Charter was not, therefore, engaged. The Canadian Court would be reluctant to measure the laws of foreign states against guarantees contained in the Canadian constitution. If, however, use of the evidence obtained under foreign law affected the fairness of a trial held in Canada, it could be excluded under a combination of

⁷⁷³ Article 8(2).

⁷⁷⁴ At 854, para 19.

⁷⁷⁵ At 854-5, para 20, following *Thomson Newspapers Ltd v Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)* [1990] 1 SCR 425.

⁷⁷⁶ At 856, para 22.

⁷⁷⁷ At 856-7, para 23.

⁷⁷⁸ At 857, para 24.

⁷⁷⁹ At 857, para 25.

sections 7 and 24 of the Charter⁷⁸⁰. Section 24 (2) provides that where a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by the Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute. It is suggested that the effect of this language is somewhat similar to that used in section 3(9) of the 1990 Act.

The minority dissent, set out in the judgement of Iacobucci, J, took a different view on the reasonable expectation point, holding that there is a reasonable expectation of privacy with regard to banking information no matter where the accounts are held, so that an account holder might reasonably expect that Canadian authorities would not be able to request the assistance of the Swiss authorities in the matter of obtaining bank records without some prior judicial authorisation in Canada⁷⁸¹. Since Scottish prosecutors have specific statutory authorisation to send letters of request without judicial intervention⁷⁸², the minority reasoning on this point is not applicable to the Scottish situation⁷⁸³.

The majority reached the same result as the Chief Justice but by different reasoning⁷⁸⁴. Their judgement was delivered by L'Heureux-Dubé, who agreed that the Charter applied only to the Canadian authorities and not to those of Switzerland⁷⁸⁵, focussing the issue by saying that international criminal investigation necessitates co-operation between states. The fact that the Canadian

⁷⁸⁰At 857, para 24.

⁷⁸¹At 872, para 56.

⁷⁸²1990 Act s3(3).

⁷⁸³The writer finds the Chief Justice's reasoning more attractive in any event because it provides an objective and predictable basis for determining whether there is a reasonable expectation of privacy. On the minority approach, the expectation of privacy would vary according to the rules applicable in the requesting state which, depending on the circumstances figured, might well be a state other than that in which the account was held or that in which the account holder resided.

⁷⁸⁴The minority approached the issue differently. It noted that section 8 of the Charter provides *ex ante* protection for privacy rights rather than merely an *ex post* validation or condemnation of a state intrusion on an individual's privacy. To operate effectively, it must operate before search and seizure is executed. The impact on the individual of a search is the same whether it takes place in Canada or Switzerland and so, by analogy with the obtaining of a search warrant within Canada, judicial authorisation should have been obtained before the request was sent.

⁷⁸⁵At 858, paras 27-8.

government might play a part in such investigations and that its part might have implications for individual rights and freedoms did not by itself mean that the Charter is engaged. Rather, the specific actions undertaken by Canadian officials had to be assessed to see whether they infringed the Charter; and the only relevant action in the instant case was the sending of the letter of request⁷⁸⁶. In a request from one part of Canada to another for the carrying out of a search, it would be the search warrant and action taken under it that would be amenable to challenge, not the making of the request. By analogy, the letter of request itself does not engage section 8 of the Charter. All of the actions which had an element of state compulsion were taken in Switzerland by the Swiss authorities⁷⁸⁷. A line fell to be drawn between those Canadian actions which did not implicate the Charter and actions by Swiss authorities which would have implicated the Charter had they been taken by Canadian authorities; and that was consistent with other decisions taken by the Court in connection with international investigations and prosecutions⁷⁸⁸.

Torres suggests that where a court in the requested state has authorised the transmission of material the Scottish courts will be slow to look behind that authorisation. *Schreiber* too leaves it substantially to the courts of the requested state to ensure that what is done in that state is done properly. Neither case, however, addresses the question of what happens where there is, or is alleged to be, an irregularity in what is done in the foreign state. The US courts have addressed that question and have shown themselves unwilling to exclude evidence obtained in questionable ways furth of US territory. In *Brulay v United States*⁷⁸⁹, for example, it was held that the finding of amphetamine tablets by Mexican border officials who had searched the appellant's car without a warrant was admissible. In *United States v Verdugo-Urquidez*⁷⁹⁰, a warrant to arrest the

⁷⁸⁶ At 859, para 29.

⁷⁸⁷ At 860, para 31.

⁷⁸⁸ At 862, para 34, citing *inter alia* *Kindler v Canada (Minister of Justice)* [1991] 2 SCR 779.

⁷⁸⁹ 383 F 2d 345 (1967) *cert denied* 389 US 986 (1986).

⁷⁹⁰ 494 US 259 (1990).

respondent in connection with narcotics trafficking and murder⁷⁹¹ had been obtained in the USA and executed by Mexican police officers who delivered him to a US border post (apparently without any extradition procedure). Thereafter, a DEA agent arranged with the Mexican police for the search of the respondent's residences in two Mexican cities. Those searches were carried out by DEA agents and Mexican officers. They found a tally sheet which was said to relate to the smuggling of marijuana in to the USA. The US District Court granted the respondent's motion to suppress that evidence on the basis that the Fourth Amendment applied and that the DEA agents had failed to justify search without warrant. The Court of Appeals affirmed that decision; but the Supreme Court reversed it on a construction of the Fourth Amendment which held that "The People" (to whom the protection against unreasonable searches applies) is a term of art which does not include aliens resident abroad⁷⁹². The Court drew a clear distinction between the due process and fair trial guarantees of the Fifth and Sixth Amendments on the one hand and the Fourth Amendment guarantees in relation to search on the other. The latter guarantees, they held, were intended to protect the people of the USA against arbitrary action by their own Government rather than to restrain the actions of that Government against aliens outside the USA. The closing sentences of the majority opinion bear quotation: "Some who violate our laws may live outside our borders under a regime quite different from that which obtains in this country. Situations threatening to important American interests may arise halfway around the globe, situations which in the view of the political branches of our Government require an American response with armed force. If there are to be restrictions on searches and seizures which occur incident to such American action, they must be imposed by the political branches through diplomatic understanding, treaty or legislation".

Serious and reprehensible as international drug trafficking and murder

⁷⁹¹ The same murder which was at issue in *Alvarez-Machain*.

⁷⁹² For criticism of this case, see EB Fisher, "The Road Not Taken: The Extraterritorial Application of the Fourth Amendment Reconsidered" 34 *Columbia Journal of Transnational Law* 705 (1996).

undoubtedly are, it is not obvious that they constitute a situation which requires a response with armed force in a neighbouring friendly country. Nor was such a response in issue in *Verdugo-Urquidez*. Moreover, an MLAT between the USA and Mexico existed⁷⁹³ but, as a result of delays in the US Senate, was not yet in force⁷⁹⁴. That Treaty provided for “the legal execution of requests for searches and seizures as ordered by the judicial authorities of the requested Party in accordance with its constitutional and other legal provisions”⁷⁹⁵. It also included a provision designed to prevent the arising of any right on the part of any private person to obtain, suppress or exclude any evidence⁷⁹⁶. That provision, together with the approach to treaties which the Supreme Court was to take in *Alvarez-Machain* (viz that consequences do not flow from extraterritorial abduction where the treaty does not specifically prohibit it), would have combined to prevent the respondent in *Verdugo-Urquidez* from relying on what was done by way of treaty in any event⁷⁹⁷. The US cases therefore offer a somewhat uncertain guide to the approach which might be taken in a Scottish court.

In *Schreiber*, it was contemplated that evidence obtained in a foreign State might be excluded if it affected the fairness of the trial adversely. A similar approach is taken in the Rome Statute of the International Criminal Court⁷⁹⁸, Article 69(7) of which limits the Court’s power to exclude evidence obtained in violation of the Statute or of internationally recognised human rights but does give such power in the situation in which the violation casts substantial doubt on the reliability of the evidence or that in which the admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings. This is language which is very close to that used by section 8 of the

⁷⁹³ Treaty on Co-operation between the United States of America and the United Mexican States for Mutual Legal Assistance 1987.

⁷⁹⁴ See EA Nadelmann, *Cops Across Borders*, 379-384.

⁷⁹⁵ Article 1(4)(c).

⁷⁹⁶ Article 1(5).

⁷⁹⁷ By way of contrast, in *R v Cook* [1996] BCJ No 2615 (QL) the British Columbia Court of Appeal took the view that the Canadian Charter of Rights and Freedoms 1982 was designed to regulate the conduct of Canadian officials and was therefore prepared to exclude evidence obtained by such officials in a foreign territory in circumstances which breached the Charter.

Canadian *Charter*. By Article 70, however, the Court is specifically prohibited from ruling on the application of the national law of the State in which evidence was gathered. It will not, therefore, be open to the accused to seek to have evidence excluded solely on the basis that it was obtained in a way which was contrary to the law of the State in which that obtaining was done.

It is clear enough in Scots law that irregularities in the obtaining of evidence may be excused so as to make the evidence admissible⁷⁹⁹. It is also clear that ECHR law says nothing directly about the admissibility of evidence⁸⁰⁰ but that the rule that irregularities in the obtaining of evidence may be excused does not of itself contravene the Convention⁸⁰¹. The appeal to fairness in section 3(9) of the 1990 Act seems to leave it open to the trial court to take into account any matter which seems to be relevant to the question, including what has happened in the requested State. *Torres* and cases from other jurisdictions suggest, however, that courts will be slow to hold that there is unfairness where what has been done was lawful in the requested State.

Conclusion

It is clear that during the middle 1980s there was a significant change in the UK's attitude to mutual assistance. As happened in the case of extradition, that change was prompted by the dissatisfaction expressed by other European governments, joined in relation to mutual assistance by the USA. Before then, the UK had scarcely engaged in mutual assistance at all. The procedures for providing mutual assistance were cumbersome and the forms of assistance which could be provided distinctly limited. Until 1980 Scots law had no legislative provision under which requests for assistance could be sent. The provision which was introduced in the Criminal Justice (Scotland) Act 1980 was intended by the government to be used only in very limited circumstances and was so construed by the courts in *Muirhead*. On the international plane, the UK had simply declined to take any part

⁷⁹⁸ UN Doc A/CONF.183/9.

⁷⁹⁹ *Lawrie v Muir*.

⁸⁰⁰ *Asch v Austria* (1993) 15 EHRR 597.

in the negotiation of ECMA. Until the middle 1980s, then, the UK's approach to mutual assistance fully justified Harding's observation about the UK's attitude that "as a common law jurisdiction with well-established mechanisms for ensuring the fairness and effectiveness of criminal proceedings, it was neither right nor possible to take much cognisance of other countries' judicial processes"⁸⁰².

Once the government had decided that international co-operation had become a matter of necessity, it moved ahead in a way which, on the face of it, was constructive. The 1990 Act makes assistance available without any requirement that there should be a treaty in place and the UK engaged quite vigorously in the negotiation of bilateral MLATs. On closer examination, however, the focus remained and remains on municipal law as the priority. Whereas other countries such as Holland and the USA have provision which permits the taking of evidence according to the procedure of the requesting State, the UK has sought to apply the model of municipal law. This is especially evident in relation to the taking of evidence within the UK.

Whilst the UK's obligations under Article 8 ECHR and Article 1 of Protocol 1 ECHR (apart from any other consideration) would probably make it necessary to regulate matters such as search of property under a consistent code of domestic law (so as to secure predictability), such considerations do not arise as regards the simple taking of oral evidence from witnesses. We have seen that in at least one case the UK's application of its domestic procedural approach to the taking of evidence has resulted in the evidence obtained by letter of request being found to be inadmissible in the requesting State, so defeating the whole point of the exercise. Pursuing this a little further, we have seen that the UK has, in its reservation to Article 3 ECMA, insisted on applying its municipal law as to privilege and non-compellability even though these are matters of the law of evidence and not primarily of property law. The point of this is not to criticise the UK's decision to give priority to national law but, rather, to highlight the giving

⁸⁰¹ *Chinoy v United Kingdom* 15199/89, 4 September 1991 (Commission).

⁸⁰² *Op cit*, 235.

of that priority.

Any process of mutual legal assistance in criminal matters involves co-operation between 2 criminal justice systems. It is possible to identify 2 different attitudes in UK law and practice to foreign criminal justice systems. In some matters there is continuing suspicion of foreign systems. We have seen that the UK wished to maintain the double criminality requirement as regards search in both the Harare Scheme and ECMA; and that, in relation to the Harare Scheme at least, that reflected anxiety about criminal justice standards in some jurisdictions. Given the apparently fraudulent nature of the request in *Zardari*, such anxiety may be understandable. In other cases, however, policy, legislation and the practice of the courts demonstrates significant trust in foreign authorities. The UK is now willing to depart from the dual criminality requirement as regards EU member States⁸⁰³. Section 4(4) of the 1990 Act requires the Secretary of State and the Lord Advocate (respectively) to rely on a certificate granted by a foreign authority as to the satisfaction of the criteria for the nomination of a court to take evidence on behalf of that foreign authority. And the courts, in Scotland and elsewhere, have been reluctant to investigate the means by which evidence has been obtained in a foreign country.

In the 1990 Act, the UK enacted a coherent code for mutual assistance law which, for the most part, reflects a clear understanding of both the international and domestic legal contexts. Nevertheless, we begin to see even in that Act a certain failure of understanding. In England and Wales, the restriction of assistance by way of search to cases in which proceedings have been commenced is difficult to square with the Harare Scheme. When one looks at the UK's reservations to ECMA and some of the Scottish legislation, other failures of understanding become apparent. The reservation to Article 2 ECMA on *non bis in idem* is in terms which are, for no obvious reason, not consistent with either the UK's position on the same issue in relation to ECE or the domestic law of either Scotland or England. The Scottish rules on the use of documentary evidence are

not reflected in what the UK has agreed in its bilateral MLAT with the USA. Within Scots law itself, section 272 of the Criminal Procedure (Scotland) Act 1995 and its associated Form 23.1-C seem to reflect a poor understanding of the international issues; and the delay until 1 May 1999 in putting in place the Forfeiture Order seems to indicate a lack of application.

The UK has a history of ignoring mutual assistance issues; now it pursues them with some vigour. Nevertheless, it has not departed from its general practice of giving priority to national law; and there are some difficulties in policy and practice which seem to indicate that there may be an inadequate understanding of aspects of the law. These conclusions, it is suggested, are consistent with what we saw in relation to extradition.

⁸⁰³See 170 above.

5. PROCEEDS OF CRIME

Introduction

In July 1995 the House of Commons Home Affairs Committee commented that "the most readily obvious internationally organised criminal activity is drug production and drug trafficking. The size of the drug economy is enormous"⁸⁰⁴; but it is, of course, not only in drug trafficking cases that there are significant proceeds to be made. It has been argued that the huge profits made on drugs are applied to the corruption of those in positions of authority in the community and then used to finance other crime including the counterfeiting of designer goods, fraud and the "piracy" of intellectual property, while the drug consumer turns to theft and prostitution to finance the addiction⁸⁰⁵.

The realisation that a proportion of crime is committed in an organised way in pursuit of profit⁸⁰⁶ has led Governments to conclude that it is desirable to attack crime by attacking its financial aspects, both so as to deny criminals the capital necessary to fund their activities and also because it is regarded as unacceptable that criminals should benefit from their crimes⁸⁰⁷. As the House of Commons Home Affairs Committee put it, "if money laundering can be detected and the proceeds of crime confiscated, crime becomes less attractive. Effective policing of financial movements can therefore become a deterrent in itself to organised crime"⁸⁰⁸. It is not accepted universally in the literature that such action

⁸⁰⁴ House of Commons Home Affairs Committee, Third Report *Organised Crime* HC 18-I, July 1995 para 19. In 1990 the House of Lords Select Committee on the European Communities noted that the turnover of the drug industry exceeds that of the international oil trade (Session 1990-91, 1st Report, *Money Laundering* (HL Paper 6) 5).

⁸⁰⁵ WA Tupman, *Police Training Requirements in the Face of New Types of Crime*, (typescript on file with author).

⁸⁰⁶ See, for example, Michael de Feo's remarks in *Proceedings of the 82nd Annual Meeting of the American Society of International Law*, 1988, 450; see also Wilmer Parker III, "Money or liberty? A dilemma for those who aid money launderers" 44 *Alabama Law Review* 763 (1993).

⁸⁰⁷ See for example PH Bucy, "The Fight Against Money Laundering: A New Jurisprudential Direction" 44 *Alabama Law Review* 839 (1993); G Polimeni, *op cit*, 10; and the remarks of the European Court of Human Rights in *Raimondo v Italy* [1994] 18 EHRR 237, especially at 260.

⁸⁰⁸ *Organised Crime*, HC 18-I, para 113.

is appropriate⁸⁰⁹ or that it actually works in practice⁸¹⁰. Even the Home Office Working Group on Confiscation has noted that the scheme has not been as successful in depriving criminals of their assets as originally anticipated⁸¹¹. However, since that issue does not bear on the relationship between international law and criminal law, it is not necessary to address it here.

The attack on the financial aspects of crime has two aspects. First, substantial efforts are directed to identifying the proceeds of crime as the criminal attempts to launder them through the financial system⁸¹² and making that system an unfriendly environment for the criminal; and secondly, since it would be unrealistic to think that it would be possible to stop all proceeds from getting into the system, it is necessary to overcome commercial or legal confidentiality in order to trace the funds, to provide a restraint mechanism under which the property of the suspect can be frozen; and to provide a mechanism for confiscating the proceeds of a suspect who has been convicted of a profit generating crime.

Whereas in relation to extradition and mutual legal assistance, the existence of a relationship between international law and criminal law was inherent in the subject, it is not so in relation to proceeds of crime. It is true that 80% of all laundering schemes in what is probably the most comprehensive review of detected cases had an international dimension⁸¹³ and that the Financial Action Task Force has said that "the stage of drugs cash movements between

⁸⁰⁹ See the summary of opposition to the policy given by Ethan A Nadelmann, "Unlaundering Dirty Money Abroad: US Foreign Policy and Financial Secrecy Jurisdictions" 18 *Inter American Law Review* 33, 38 (1986). For substantive criticism, see: B Fisse and D Fraser, "Some Antipodean Scepticisms about Forfeiture, Confiscation of Proceeds of Crime and Money Laundering Offences" 44 *Alabama Law Review* 737 (1993); C Sallon and D Bedingfield, "Drugs, Money and the Law" [1993] *Crim LR* 165; Eric L Jensen and Jurg Gerber, "The Civil Forfeiture of Assets and the War on Drugs: Expanding Criminal Sanctions While Reducing Due Process Protections" 42 *Crime and Delinquency* 421 (1996).

⁸¹⁰ See for example M Levi, "Evaluating the 'New Policing': Attacking the Money Trail of Organized Crime" 30 *The Australian and New Zealand Journal of Criminology* 1, 8 (1997).

⁸¹¹ Third Report, 1998, para 4.2.

⁸¹² For accounts of money laundering techniques, see DA Chaiken, "Money Laundering: An Investigatory Perspective" 2 *Criminal Law Forum* 467 (1991) and W Gilmore, *Dirty Money*, 37.

⁸¹³ ME Beare and S Schneider, *Tracing of Illicit Funds: Money Laundering in Canada*, Ministry of the Solicitor General of Canada, 1990, xxiii.

countries is crucial in the detection of money laundering"⁸¹⁴. The most recent report on money laundering typologies, published by the Financial Action Task Force, once again confirms the frequency with which cross border transactions are a feature of money laundering. Particular reference is made to the use of foreign legal entities and "Hawala" alternative remittance systems⁸¹⁵. There is, however, no necessity for the proceeds of crime to cross borders if the criminal can launder his proceeds in some other way. Nadelmann asserted as long ago as 1986 that "most dirty money, including most drug money, is almost certainly laundered without ever leaving the United States"⁸¹⁶.

During the formative period of UK proceeds of crime law in the middle third of the 1980s, the UK had not yet begun to engage in a positive way in mutual legal assistance. That and the fact that money laundering typologies were less well understood than they are now might go a considerable way towards explaining the particular way in which UK proceeds of crime law developed. The early focus was on the proceeds of drug trafficking and confiscation law developed much more quickly than money laundering law. Mutual assistance mechanisms developed particularly slowly and, indeed, so far as Scots law is concerned, although confiscation of drug trafficking proceeds was provided for in the Criminal Justice (Scotland) Act 1987 ("the 1987 Act"), it was only on 1 May 1999, with the coming into force of the Confiscation of the Proceeds of Crime (Designated Countries and Territories) (Scotland) Order 1999⁸¹⁷ that it became possible to co-operate fully in the confiscation of the proceeds of non-drug crime. Against this background, it should not surprise us that the extent of the relationship between international law and municipal proceeds of crime law was at first rather limited and has steadily become deeper and more sophisticated as the law has developed and expanded to take greater account of the transnational

⁸¹⁴ Recommendations, reproduced in Hector L MacQueen (ed), *Money Laundering*, David Hume Institute/Edinburgh University Press, 1993, 28.

⁸¹⁵ Financial Action Task Force on Money Laundering, *1998-1999 Report on Money Laundering Typologies*, paras 22 and 39

⁸¹⁶ Ethan A Nadelmann, "Unlaundering Dirty Money...", 41.

⁸¹⁷ SI 1999 No 290 (S16).

aspects of money laundering.

The relationship between international law and criminal law has, in relation to proceeds of crime, been developing rather than constant. It is most easily examined by a broadly chronological account moving between the international and municipal planes rather than making the more absolute division which was employed in relation to extradition and mutual assistance.

Before that account is given, there is one point of critical importance to be made. Proceeds of crime law in both Scotland and England took its fundamental shape on the basis of domestic, rather than international, considerations⁸¹⁸. It will be shown both that the UK required to alter its law very little in order to meet its international obligations and also that it has tended to treat the international and European instruments as opportunities to extend its law in pursuit of existing policy (sometimes beyond the demands of the international obligation). That being so, and since the writer has already analysed substantive proceeds of crime law (both Scots and international) in some detail elsewhere⁸¹⁹ it is not appropriate in this thesis to embark on a lengthy analysis of the substantive international or domestic law. The content of that law would tell us little about the relationship between international law and Scottish criminal law. What matters is the way international law and domestic law relate to one another; and that is not a matter of textual analysis.

On the other hand, the mutual assistance aspect of proceeds of crime law, especially as regards Scotland, has not previously been the subject of much analysis and does have some significance for the relationship with which we are concerned. Accordingly, the mutual assistance aspect has a somewhat higher profile in this chapter than it would merit in a straightforward critical analysis of proceeds of crime law as such, and the substantive content of the money laundering and confiscation provisions of the treaties and the legislation is treated in less depth than would have been the case in such an analysis.

⁸¹⁸ See 241.

The early development of the law

Some commentators have claimed to identify the origins of proceeds of crime law in English forfeiture law dating from feudal times⁸²⁰. It is questionable whether the link can really be made but not necessary to express any decided view on the matter here. What can be said with some certainty is that in modern times the attack on the financial aspects of crime began, in a recognisable form, in the USA during the 1970s⁸²¹. Developments on the international plane began with a Recommendation of the Committee of Ministers of the Council of Europe⁸²². That arose out of concern about crimes of violence, especially hold-ups and kidnappings, and was based on the assumption that criminality in Europe had shown "an impressive increase in organised violent criminality supported by large financial resources and aimed at raising more and more gain"⁸²³. "Hold-ups" and kidnappings are crimes which are likely to result in cash payments to criminals and there is the possibility of such payments being made with bank notes whose serial numbers are known. The Recommendation reflected this by urging the constitution of reserve stocks of banknotes whose serial numbers could be disclosed to the authorities in the event of their use in connection with criminal offences, international information exchange about the circulation of such notes and machinery whereby banks could refer to lists of banknotes used in connection with crime. This emphasis on banknote serial numbers did not find a place in later instruments, essentially because it came to be the case that the predicate offences

⁸¹⁹ Alastair N Brown, *Proceeds of Crime: Money Laundering, Confiscation and Forfeiture*, W Green/ Sweet & Maxwell, 1996.

⁸²⁰ For example, Andrew R Mitchell, Susan ME Taylor and Kennedy V Talbot, *Mitchell Taylor and Talbot on Confiscation and the Proceeds of Crime*, 2nd edition, Sweet & Maxwell, 1997, 1; Jensen and Gerber, *op cit*; and, to a lesser extent, Shannon T Noya, "Hoisted by their own petard: adverse inferences in civil forfeiture" 86 *Journal of Criminal Law and Criminology* 493, 497 (1996).

⁸²¹ For a critical analysis of the US approach from an English law perspective, see M Zander, *Confiscation and Forfeiture Law: English and American Comparisons*, Police Foundation, July 1989.

⁸²² Recommendation No R(80)10 Adopted by the Committee of Ministers of the Council of Europe on 27 June 1980: *Measures Against the Transfer and Safekeeping of Funds of Criminal Origin*.

⁸²³ Explanatory Memorandum para 2

which drove the development of the law were those such as drug trafficking⁸²⁴ in which such serial numbers are unlikely to be known. But other themes of the Recommendation were to recur and these included identity checks on customers in certain circumstances⁸²⁵, the provision of training for bank cashiers in checking identity papers and detecting criminal behaviour and the establishment of national and international co-operation between banks and "the appropriate authorities". The Recommendation did not, however, have any perceptible effect on UK law. In particular, the anti-money laundering measures which it desiderated were not to be reflected in UK law until 1993, when it became necessary to legislate so as to implement EC law⁸²⁶.

The start of proceeds of crime law (or modern proceeds of crime law at any rate) in the UK was marked by *R v Cuthbertson*⁸²⁷. That case established that the forfeiture provision of the Misuse of Drugs Act 1971⁸²⁸ was not apt to deal with the laundered proceeds of drug trafficking, especially where the conviction was not even for an offence under the 1971 Act⁸²⁹. This decision caused substantial public concern⁸³⁰ and resulted in the formation, under the auspices of the Howard League, of the Hodgson Committee with a remit to consider the law and possible reforms⁸³¹. That Committee made recommendations for a confiscation mechanism⁸³² but devoted only three and a half pages⁸³³ to

⁸²⁴As recently as 10 February 1999, FATF noted that "Narcotics trafficking appears still to be the primary single source of criminal proceeds among the majority of FATF members. The various types of fraud (fiscal, EU funds, value added tax, insurance, bankruptcy, etc.) are the next major source of illegal funds, if not, in some jurisdictions, the primary source." (Financial Action Task Force on Money Laundering, *1998-1999 Report on Money Laundering Typologies*, para 43).

⁸²⁵The opening of an account, the renting of a safe deposit or the effecting of cash transactions or bank transfers above a certain magnitude (bearing mind the possibility of structuring linked transactions as an avoidance device).

⁸²⁶See 273 below.

⁸²⁷[1980] 3 WLR 89.

⁸²⁸Section 27.

⁸²⁹The charge was one of conspiracy.

⁸³⁰For critical analysis of *R v Cuthbertson*, see Alec Samuels, "The Misuse of Rules of Statutory Interpretation" [1980] *Statute Law Review* 166.

⁸³¹Sir Derek Hodgson (Chairman), *The Profits of Crime and Their Recovery: Report of a Committee*, Heinemann, 1984.

⁸³²For detailed analysis, see Martin Wasik, "The Hodgson Report on the Profits of Crime and Their Recovery" [1984] *Crim LR* 708.

international law. Those pages concentrated on the inadequacy of mutual assistance arrangements.

At the time the Hodgson Committee reported, the 1980 Council of Europe Recommendation was the only formal international instrument which bore significantly on proceeds of crime. It went unnoticed in the Hodgson Report. There were, however, other important international developments which should be noticed. Proceeds of crime issues were discussed in the Council of Europe Pompidou Group in 1983 and 1985⁸³⁴ and the UK, as a member of that Group, must have been aware of the discussions. Of greater importance, however (and hardly noticed in the literature) were early developments within the framework of the UN. Following meetings in 1980⁸³⁵ and 1984⁸³⁶ there was convened in October 1984 the Second Expert Group Meeting on the Forfeiture of the Proceeds of Drug Crimes. That Group examined national legislation and experience in the field and made a series of suggestions for inclusion in an international instrument to address the forfeiture of the proceeds of drug trafficking. There is such significant overlap between those recommendations and the 1988 UN Drugs Convention as adopted that it is inconceivable that the Group's Report⁸³⁷ was not an influence on the Convention. The UK participated in that group. In 1985, the UN Commission on Narcotic Drugs requested the Secretary-General to seek from member States comments and proposals on the elements they would like to have incorporated in what was ultimately to become the 1988 UN Drugs Convention⁸³⁸. In its response to the Secretary-General's letter⁸³⁹, the UK Government said that it was preparing

⁸³³ 140-143.

⁸³⁴ Council of Europe, *Explanatory Report on the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime*, para 2.

⁸³⁵ Meeting on Financial Assets and Transactions relating to Illicit Drug Traffic (UN Doc. E/CN.7/657/Add 2).

⁸³⁶ First Expert Group Meeting on the Forfeiture of the Profits and Proceeds of Drug Crimes (UN Doc DND/WP.1983/23/Rev.1).

⁸³⁷ Report of the Second Expert Group Meeting on the Forfeiture of the Proceeds of Drug Crimes (UN Doc MNAR/1984/13).

⁸³⁸ See *Preparation of a draft convention against the illicit traffic in narcotic drugs and psychotropic substances: report of the Secretary-General* (UN Doc E/CN.7/1987/2, 13 June 1986).

⁸³⁹ UN Doc NAR/CL. 2/1985 (15 March 1985).

legislation to allow for the assets of drug traffickers to be traced, frozen and seized and that the measures which it had in mind were "based upon those set out in chapter V of the Report of the Second Expert Group Meeting on the forfeiture of the proceeds of drug crimes"⁸⁴⁰.

This, however, overstated the position. The recommendations of that Group had international co-operation as their principal focus. The recommendations which did not address that subject contained nothing which could not also be found in the Hodgson Report. It seems likely, therefore, that the recommendations of the Group reinforced those of the Hodgson Report and were themselves the genesis of the Drug Trafficking Offences Act 1986 ("DTOA") section 26 (which provided for the enforcement of foreign confiscation orders) but there is no evidence that they exerted any greater influence than that. With this limited exception, then, it seems legitimate to conclude that the foundations of UK proceeds of crime law were essentially municipal.

By the time the early draft of what was to become the 1988 UN Drugs Convention was circulated (sometime after June 1986) ("the 1986 UN draft"), DTOA was already complete. UK negotiators therefore went to international discussions with an existing framework of English municipal law. That framework was sufficiently developed and comprehensive for the Home Office Minister of State to be able, in due course, to say to the House of Lords that "our law and working procedures already enable the United Kingdom to apply many-if not most-of the requirements of the convention"⁸⁴¹.

DTOA and the 1987 Act

In May 1985 the Home Affairs Committee had recommended that UK law should be amended to provide for the seizure and forfeiture of assets connected with drug traffic in accordance with American practice⁸⁴². The US model was to be rejected

⁸⁴⁰ Response by the Government of the United Kingdom to the Secretary-General's letter (n839 above); National Library of Scotland Shelfmark GHD 2/10.

⁸⁴¹ HL Debs Vol 513, 12 December 1989, col 1218.

⁸⁴² Fifth (Interim) Report, *Misuse of Hard Drugs*, May 1985, HC 399.

by the Government as incompatible with the British system⁸⁴³ but the recommendations of the Hodgson Committee and the Home Affairs Committee resulted in DTOA, which became the foundation and pattern for UK proceeds of crime law in both its municipal and its international aspects.

DTOA was followed by Part I of the 1987 Act, which has been well described as "essentially a Scottish adaptation of the Drug Trafficking Offences Act 1986"⁸⁴⁴. Both DTOA and the 1987 Act were concerned exclusively with the proceeds of drug trafficking. Other predicate offences were not addressed.

It is not necessary to analyse these 2 Acts in detail here. In any event, much of their content is technical municipal procedure with no international significance. However, since DTOA in particular provided the framework of municipal law on the basis of which UK negotiations were subsequently to proceed at international conferences, the general provisions of DTOA and the 1987 Act should be summarised at this stage. Neither Act is now in force. For Scotland, the law has been consolidated in the 1995 Act; but its essential features remain the same.

The confiscation order is the heart of the scheme and its whole point. It is important to understand its nature. There are two approaches commonly in use in legal systems for the confiscation of the proceeds of crime. The first of these is "property confiscation" under which ownership rights in specific property which is derived directly or indirectly from offences are transferred to the state. Under the second, which is "value confiscation" there is a requirement to pay a sum of money based on an assessment of the value of property derived directly or indirectly from crime⁸⁴⁵. Both Scots and English law operate value confiscation.

In seeking to achieve confiscation, the first requirement which the law enforcement authorities have is for a means of investigating the financial aspects

⁸⁴³ See HC Debates, 1986, Vol 90, Cols 278-9.

⁸⁴⁴ Christopher Gane, "Criminal Justice (Scotland) Act 1987", *Current Law Statutes Annotated* 1987, 41-3.

⁸⁴⁵ See Council of Europe, *Explanatory Report on the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime*, 1990, para 15.

of crime. Such a means of investigation was provided for by sections 27 and 28 of DTOA and sections 38 and 39 of the 1987 Act. Under the Scottish provisions the procurator fiscal could get an order requiring the production of material and, if need be, a search warrant.

The drafting of DTOA section 27 and section 38 of the 1987 Act, its Scottish equivalent, also took account of the cross border features of money laundering. These provisions made it possible "for the purpose of an investigation into drug trafficking" to obtain an order for the production of material. The expression "drug trafficking" was defined so as to cover drug trafficking anywhere in the world⁸⁴⁶ and the result is to make this investigative tool available for the assistance of an investigation anywhere. In *R v Crown Court at Southwark ex parte Customs and Excise Commissioners*⁸⁴⁷ the Divisional Court in England held that there was nothing in the legislation to restrict the making of such orders to cases being investigated by UK investigators. On the contrary, Watkins LJ said that one of the purposes of the legislation is to advance the international co-operation to which the UK is bound by the UN Single Convention on Narcotic Drugs 1961. The Court held that the judge who had granted the order had exceeded his powers when he attached a condition preventing Customs and Excise from communicating the results of the execution of the order to foreign investigators without special leave of the Court.

Assets having been identified by investigation, the restraint order mechanism already described briefly could be brought into play to try to prevent the accused from putting his assets beyond reach of attempts to enforce any confiscation order which might ultimately be made.

This mechanism, in its Scottish manifestation, interdicts those affected by it from dealing with their property and allows the Crown to use inhibition and arrestment to "freeze" property more effectively. The intended effect was

⁸⁴⁶ DTOA s38(1); 1987 Act s1(6).

⁸⁴⁷ [1989] 3 All ER 673.

described by Otton J. in *Re M*⁸⁴⁸: "The property to which the Restraint Order applies is no longer to be considered a part of the defendant's estate. He holds only notional title to such properties. All dealings with such property are to be held in abeyance until such time as the defendant is acquitted or a Confiscation Order is made and satisfied".

The English restraint order⁸⁴⁹ owes much to the *Mareva* injunction⁸⁵⁰ and in particular carries with it the possibility of certain collateral orders based on the *Mareva* analogy. These are an order that the defendant must provide an affidavit as to the existence, location and value of all his assets⁸⁵¹ and an order that the defendant must bring realisable property held overseas back within the jurisdiction⁸⁵². In making such orders, the English courts have drawn on the *Mareva* jurisprudence and the principles of Equity. The Scottish courts have no equivalent basis for the making of such orders and neither the 1987 Act nor its successor, the 1995 Act, provides a statutory basis⁸⁵³. It follows that the confiscation legislation of the 1980s was drafted first under reference to English legal categories and then translated imperfectly into Scottish terms with the result that the Scottish restraint order is a more restricted instrument than its English model.

If the accused person is convicted it is open to the prosecutor to seek a confiscation order. Here the Scottish approach diverged from the English model.

⁸⁴⁸ [1992] 1 All ER 537.

⁸⁴⁹ For analysis of the English restraint order see David Feldman, "Freezing Defendants' Assets Before Drugs Trials" [1987] *New Law Journal* 457.

⁸⁵⁰ *Mareva Compania Naviera SA v International Bulk Carriers SA (The Mareva)* [1980] 1 All ER 231 CA. For detailed analysis see Steven Gee, *Mareva Injunctions and Anton Piller Relief*, FT Law and Tax, 1995, especially chapter 20 ("Criminal *Marevas*, restraint orders and receivers").

⁸⁵¹ First made in *Re O* [1991] 2 WLR 475, under reference to *AJ Bekhor & Co Ltd v Bilton* [1981] QB 923, a civil *Mareva* case.

⁸⁵² On the basis of *Derby & Co v Weldon (No 6)* [1990] 3 All ER 263, another *Mareva* case.

⁸⁵³ It is, therefore, ironic that the arrangements for the enforcement of Scottish restraint and confiscation orders in relation to property in England have on at least one case resulted in the Divisional Court making ancillary orders for the swearing by the accused of an affidavit as to his whole financial circumstances and as to the particular circumstances relating to the receipt by him of a particular sum of money and for the deposit by him of over £23,000 in a building society account known to the Crown Prosecution Service (*In the matter of John Wintour Scott Steele*

Whereas under DTOA the convicting court was obliged to consider whether there was any benefit from crime and, if it found there was, proceed to make a confiscation order⁸⁵⁴, under section 1(1) of the 1987 Act it was (and, under the 1995 Act, remains) only the prosecutor's motion that could trigger the making of such an order. Moreover, and by the same section, the Scottish court was given a discretion whether or not to make a confiscation order and about the amount of any such order.

Sections 27 to 32 of the 1987 Act dealt with reciprocal arrangements for the enforcement of orders made by courts outwith Scotland. The starting point was DTOA section 26 which permitted the registration in the (English) High Court of confiscation orders made in countries or territories outside the UK, designated by Order in Council. Earl Ferrers, Minister of State at the Home Office, was in due course to say that the "spirit" of the provision "is to strengthen co-operation between ourselves and other countries with a view to depriving drug traffickers of ill gotten gains"⁸⁵⁵. The designation process was triggered by the existence of a treaty relationship. Provision to identical effect, permitting the registration of such external orders in the Court of Session, was made by section 30 of the 1987 Act. That provision has now been consolidated in sections 40 and 41 of the 1995 Act.

According to Harding, the complexity of these provisions and the absence at the time they were introduced of any multilateral instrument caused the UK to conclude that bilateral agreements would be necessary to ensure reciprocity and the effective operation of the process⁸⁵⁶. The absence of any multilateral instrument was, however, remedied quickly by Article 7 of the 1988 UN Drugs Convention under reference to which most of the UK's bilateral proceeds of crime MLATs are drafted. The general approach of these sections was to apply the

Robertson, unreported, High Court of Justice, Queen's Bench Division, 16 March 1994, copy of order on file with author).

⁸⁵⁴ DTOA s1.

⁸⁵⁵ HL Debs Vol 513 col 1231 (12 December 1989).

⁸⁵⁶ Alan Harding, *op cit*, at 239.

municipal arrangements, so far as practicable, to the enforcement of foreign orders. This approach has persisted and the current arrangements are discussed below.

Substantive money laundering law was set out in DTOA section 24, with a virtually identical provision for Scotland in section 43 of the 1987 Act (now to be found at section 38 of the (Consolidation) Act. These provisions were rather basic and certainly did not go nearly so far as UK money laundering law now goes.

The section made it an offence for a person to enter into or be otherwise concerned in an arrangement whereby the retention or control by or on behalf of another of that other person's proceeds of drug trafficking was facilitated (whether by concealment, removal from the jurisdiction, transfer to nominees or otherwise), or whereby that other person's proceeds of drug trafficking were used to secure that funds were placed at the other person's disposal, or were used for the other person's benefit to acquire property by way of investment. Liability to conviction only arose, however, where the accused knew or suspected that the person he assisted in this way was a person who carried on or had carried on drug trafficking or had benefited from drug trafficking. There was a defence and some civil immunity where the suspicion was disclosed to a constable before the arrangement was entered into (or, in some circumstances, very shortly thereafter).

This offence was not capable of being committed by a person in relation to his own personal proceeds of drug trafficking. It was aimed at those who have not participated in the actual trafficking but who assist in retention. The precondition for the commission of this offence was that the accused knew or suspected that the other person was one who carried on, or had carried on, or had derived financial or other rewards from, drug trafficking. Mitchell, Taylor and Talbot suggest that, as to the meaning of "knowing", an analogy might be drawn with the law on possession of stolen property⁸⁵⁷. They also suggest that "suspicion" must be given its dictionary meaning and that "an inkling or fleeting thought that the property might be the proceeds of drug trafficking" would be sufficient. The writer

disagrees⁸⁵⁸ but which of us is correct is not the issue here. Since Taylor was head of the Crown Prosecution Service Central Confiscation Unit and worked closely with the Home Office on these issues, it seems likely that those authors were expressing what the UK Government thought the legislation which it had enacted meant.

The suspicion which was relevant was one that the other person is one who carried on, or had carried on, or had derived financial or other rewards from, *drug trafficking*. The section did not require knowledge or suspicion as to the provenance of the property or as to the effect of the arrangement. Even an apparently innocent transaction might in fact turn out to be within the section and thus found criminal liability if the relevant suspicion as to the person concerned could be proved⁸⁵⁹.

The Criminal Justice Act 1988

It was evident that predicate offences other than drug trafficking are capable of generating significant profits and so a confiscation scheme for crime other than drug trafficking was provided for English law by Part VI of the Criminal Justice Act 1988. That scheme followed the pattern of DTOA very closely, the most significant differences (apart from the wider range of predicate offence) being the imposition of a threshold of £10,000 benefit from crime before the scheme could come into effect⁸⁶⁰ and the absence of any assumptions about the provenance of income or property⁸⁶¹. That scheme did not apply to Scotland, where the question of the most appropriate course was referred to the Scottish Law Commission. It was only after the publication of their *Report on Confiscation and Forfeiture*⁸⁶² in 1994 that such a scheme was established for Scotland. Some aspects of that are for consideration below. And for the sake of completeness, Schedules 4 and 7 of

⁸⁵⁷ *Op cit*, 186-7.

⁸⁵⁸ See Alastair Brown, "Money Laundering: A European and UK Perspective" [1997] JIBL 307.

⁸⁵⁹ Although these remarks are made in the past tense, they all remain true of the current legislative equivalents.

⁸⁶⁰ Criminal Justice Act 1988 s71(2)(b)(ii).

⁸⁶¹ Both of these features have since changed.

⁸⁶² Scot Law Com No 147.

the Prevention of Terrorism (Temporary Provisions) Act 1989, which provide a confiscation scheme in respect of terrorist funds, should also be mentioned but need not be analysed⁸⁶³.

The Comprehensive Multidisciplinary Outline

The late 1980s saw important developments on the international plane. The beginning of these developments was marked by UN General Assembly Resolution 39/141 of 14 December 1984. That Resolution, which was prompted by an initiative by the Government of Venezuela⁸⁶⁴, requested the Commission on Narcotic Drugs to give priority to the preparation to what in due course became the 1988 UN Drugs Convention. In the lead up to that, the International Conference on Drug Abuse and Illicit Trafficking was held in June 1987 and not only supported the idea of a Convention but also adopted a Comprehensive Multidisciplinary Outline of Future Activities in Drug Abuse Control⁸⁶⁵. That Outline set out targets "particularising the objective to be attained and the action to be taken" at both national and international levels⁸⁶⁶. Target 23 was the forfeiture of the instruments and *proceeds* of illicit drug trafficking. Consideration was to be given to making it possible to seize, freeze and forfeit objects knowingly used in trafficking and the proceeds thereof, including objects knowingly acquired with those proceeds⁸⁶⁷. DTOA combined with section 27 of

⁸⁶³ But see An Official of the Northern Ireland Office, "Tackling Terrorist Finance" in *Action Against Transnational Criminality, Vol II: Papers from the 1992 Oxford Conference on International and White Collar Crime*, Commonwealth Secretariat, 1993, p80; Keith Maguire, "Fraud, extortion and racketeering: The black economy in Northern Ireland" 20 *Crime Law and Social Change* 273 (1993); and for more detailed analysis, Alastair N Brown, *Proceeds of Crime...* 287-299.

⁸⁶⁴ William C Gilmore, *Dirty Money*, 63.

⁸⁶⁵ See "United Nations International Conference on Drug Abuse and Illicit Trafficking: Decisions of the Conference" 26 ILM 1637 (1987). The *Comprehensive Multidisciplinary Outline* is reproduced at 26 ILM 1638 (1987). The UK Government claimed to have "played an active part" in the Conference and described the development in terms which suggest that it favoured the policy approaches set out in the *Outline*-see *Tackling Drug Misuse: a summary of the Government's strategy* Home Office, 1988, para 3.11. Gilmore has confirmed the UK's generally positive and active role in these developments (William C Gilmore, "International Action Against Drug Trafficking: Trends...367-8).

⁸⁶⁶ Para 12.

⁸⁶⁷ Para 281.

the 1971 Act already provided such mechanisms for English law and the 1987 Act was to do so for Scots law. Furthermore, it was said that associations of banks and similar institutions should devise codes of conduct whereby their members would assist the authorities and that legislation should provide for penalties if the personnel of such institutions knowingly participated in or facilitated schemes for concealing information about money laundering⁸⁶⁸. Finally, investigation of the income levels of suspects was desiderated⁸⁶⁹. The assumptions provided for by DTOA were consistent with this approach and concentration on the income of the suspect has marked the Scottish approach to confiscation procedures from their inception⁸⁷⁰. It should be said, however, that this approach arose in Scottish practice entirely independently of the Comprehensive Multidisciplinary Outline. It was suggested by the then Home Advocate Depute⁸⁷¹ in an internal Crown Office document entitled "Confiscation Orders: Preparation of Financial Information"⁸⁷² which showed no sign of awareness of the existence of the Outline. For that matter, nothing in the Crown Office files relating to the passing of the 1987 Act suggests that anyone at Scottish Office or Crown Office concerned in the passing of the 1987 Act had even heard of the work going on in relation to the Outline. In short, the relationship between UK law and the Outline was one of consistency, with the UK supporting the strategy ultimately adopted in that document.

The Basle Statement

December 1988 saw the adoption of two instruments, one informal and one formal. The (relatively) informal instrument was the *Statement on Prevention of Criminal Use of the Banking System for the Purpose of Money Laundering* promulgated by the Basle Committee on Banking Regulations and Supervisory Practices. This important document has informed not only the practice of banking supervisors internationally but also the content of other international instruments.

⁸⁶⁸ Para 283.

⁸⁶⁹ Para 284.

⁸⁷⁰ See *HM Advocate v McLean* 1993 SCCR 917 and Alastair N Brown, *Proceeds of Crime*, 27-28.

⁸⁷¹ GW Penrose QC (as he then was).

⁸⁷² May 1989. Copy on file with author.

The Statement has no binding force in international law, but is a general statement of ethical principles which encourages banks' management to put in place effective anti-laundering procedures. It is therefore a "self regulation" measure and exactly the kind of thing contemplated by the *Comprehensive Multidisciplinary Outline*, though its voluntary character has since been overtaken by a hardening approach, both internationally and domestically⁸⁷³.

The Statement proceeds on the basis that the first and most important safeguard against money laundering is the integrity of banks' own managements and their determination to prevent their institutions being used as a channel for money laundering. The Statement is intended to reinforce those standards of conduct. The vulnerability of banks has been pointed out by Beare and Schneider, who say that "Deposit-taking institutions are the common thread running through the myriad of money laundering schemes available to criminal enterprises...banks are used to launder more money in Canada than all other laundering vehicles combined"⁸⁷⁴. It remains true in 1999 that such institutions figure largely in the Financial Action Task Force ("FATF") report on money laundering typologies⁸⁷⁵, though the focus is now on e-cash and online banking.

The Statement contains three substantive elements and reflects the themes of the Council of Europe Recommendation. The first is that for which the Statement is best known and it is that banks should make "reasonable efforts to determine the true identity of all customers requesting the institution's services." This (the so called "know your customer" principle) is elaborated to desiderate particular care in the identification of the ownership of all accounts and of those using safe custody facilities, effective procedures for obtaining identification from new customers and an explicit policy that significant business transactions will not be conducted with those who fail to provide evidence of their identity.

⁸⁷³The Basle Committee has continued to promote good practice-see Jack A Blum, Michael Levi, RT Naylor and Phil Williams, *Financial Havens, Banking Secrecy and Money Laundering*, UNDCP Crime Prevention and Criminal Justice Newsletter, 1998, 32.

⁸⁷⁴ *Op cit* 10.

⁸⁷⁵ *Op cit*.

Next, the Statement urges compliance with law and that banks should not set out to offer services or provide active assistance in transactions which they have good reason to suppose are associated with money laundering activities. Finally, banks are urged to co-operate fully with national law enforcement authorities to the extent permitted by specific local regulations relating to customer confidentiality.

The 1988 UN Drugs Convention

At Council of Europe level, the issue of action against the proceeds of crime was discussed with particular reference to drug trafficking in the Pompidou Group in 1983 and 1985 and in 1987 steps were taken which were to lead to the elaboration of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime ("the Council of Europe Laundering Convention"). In the meantime, however, work had begun at UN level and the work of the Council of Europe was somewhat eclipsed by what became the 1988 UN Drugs Convention, which was adopted on 19 December 1988 and is of foundational importance in relation to international co-operation in the area of drug trafficking. In the European context alone, it exerted a major influence on the Council of Europe Laundering Convention and on the EC Directive on prevention of the use of the financial system for the purpose of money laundering. On a wider stage it has formed an essential framework for the work of FATF and, indeed, implementation and ratification of the treaty was the very first of the recommendations made by FATF⁸⁷⁶.

The preamble makes plain the intention of those who drafted the Convention. The Conference was "desiring to conclude a comprehensive, effective and operational convention that is directed specifically against illicit traffic and that considers the various aspects of the problem as a whole, in particular those aspects not envisaged in the existing treaties in the field of narcotic drugs and psychotropic substances". In large measure, the objective of

⁸⁷⁶ Reproduced in Hector L MacQueen (ed) *Money Laundering*, 21.

comprehensiveness was achieved. In Gilmore's words, as well as requiring the criminalisation of drugs money laundering, the 1988 UN Drugs Convention "makes major advances in relation to mutual legal assistance and confiscation and eliminates bank secrecy as a barrier to these important forms of international co-operation. Even in the more traditional field of extradition some progress was recorded. In the normally contentious area of jurisdiction obligations are imposed and, perhaps more significantly, new opportunities presented to state parties in terms of the ordering of their mutual relations. Furthermore, this treaty promotes innovative law enforcement techniques such as controlled delivery and facilitates action in circumstances which, as with the interdiction of foreign flag vessels on the high seas, have previously given rise to difficulties and inefficiencies"⁸⁷⁷. Not only that but there was an unusually rapid series of ratifications of the treaty so that it received the ratifications required to bring it into force in near record time. Now only a small minority of states are not parties⁸⁷⁸.

The proceeds of crime provisions of the Convention occur primarily in Articles 3 and 5 and have been said to have "established a new direction in multinational co-operation in the field of crime prevention and control"⁸⁷⁹. Article 3 demands the criminalisation of certain forms of conduct, including money laundering, whilst Article 5 requires the adoption of measures which make confiscation possible. Aspects of these provisions are now to be analysed in light of existing Scots law but in general it may be said that it was only in their money laundering aspect that they required legislative action from the UK. That action took place in the 1990 Act.

Both confiscation and money laundering featured in the 1986 UN draft. Comparison of that draft and the recommendations of the Second Expert Group

⁸⁷⁷ W Gilmore, *Combatting International Drugs Trafficking: The 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, Commonwealth Secretariat, 1991, 42.

⁸⁷⁸ See Gilmore, *Dirty Money*, 63-64.

⁸⁷⁹ Edward G Lee, Legal Adviser to the Department of External Affairs, Canada, in *Proceedings of the 82nd Annual Meeting of the American Society of International Law*, 1988, 447. Since Mr Lee's

suggests that those recommendations must have informed the draft-there are many similarities. It is, on this basis, legitimate to point out that the Expert Group's examination of trends in national legislation provided the basis of those recommendations; and that the recommendations of the Hodgson Report as regards confiscation, restraint orders and the reversal of the onus of proof as to the provenance of assets were before the Group⁸⁸⁰. These were themes which were eventually to find their way into the 1988 UN Drugs Convention. Since those themes also occurred in the legislation of other states it cannot be said that the recommendations were in any sense based exclusively on English law; but having regard to the fact that the Report had some influence on DTOA the references to the Hodgson Report in the Expert Group Report indicates that there can sometimes be cross fertilisation during the developmental stages of both treaties and Acts of Parliament.

As might be expected, the drafting developed between that first draft and the final text of the Convention. We know that the UK participated in the ongoing discussions⁸⁸¹ but, because the reports of the pre-Vienna meetings⁸⁸² are highly compressed and do not distinguish the contributions of individual delegations, we cannot know what the UK's particular negotiating position at those meetings was. Although the position changes for the Vienna Conference itself because the summary records of the plenary meetings and of the meetings of the Committees of the Whole are published⁸⁸³ and report the interventions made not merely by national delegations but also by individual members of those delegations, the draft which was discussed at the Vienna Conference was already in a form which was very close to the Convention as ultimately adopted. Examination of the 1986 UN

remarks do not carry any disclaimer it seems likely that he was expressing an official Canadian Government view.

⁸⁸⁰ *Op cit* paras 24-27.

⁸⁸¹ See *Reports of the open-ended intergovernmental expert group meeting on the preparation of a draft convention against illicit traffic in narcotic drugs and psychotropic substances* (UN Doc E/CN.7/1988/2, 23 October 1987 and 8 February 1988).

⁸⁸² *Ibid.*

⁸⁸³ *United Nations Conference for the Adoption of a Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances: Official Records, Volume II* (UN Doc E/CONF.82/16/Add.1.

draft and comparison with DTOA suggests that the UK did not, in the preparatory work, have to confront any proposal which would have required fundamental change in municipal law. However, in the absence of detailed records of the preparatory meetings and until the UK Government's own records reach the public domain it is not possible to express the UK position with any greater certainty.

The money laundering provisions are contained in Article 2 of the 1988 UN draft and the confiscation provisions are in Article 3⁸⁸⁴. As regards money laundering, the draft required all parties to "adopt such measures as may be necessary to establish as offences under its criminal law, when completed intentionally (a)...(iii) concealment, disguise or conversion of the nature, source, disposition, movement or ownership of property, knowing that such property is derived from illicit traffic; (b) subject to its constitutional limitations, legal system and domestic law (i) acquisition, possession or use of property knowing that such property is derived from illicit traffic...". As regards confiscation the draft required that confiscation should apply to proceeds of drug trafficking but also to narcotic drugs and psychotropic substances, materials and equipment and other instrumentalities of the crime. The confiscation of drugs, materials, equipment and other instrumentalities is, in Scots law, dealt with as forfeiture and is beyond the scope of this thesis⁸⁸⁵. The draft also demanded the provision of mutual legal assistance in relation to the proceeds of crime and this aspect is addressed below⁸⁸⁶.

So far as concerned the confiscation of the proceeds of drug trafficking, the draft contemplated that proceeds derived from offences established in accordance with article 2 paragraph 1 of the draft should be liable to confiscation. Article 2 paragraph 1 (which was to become Article 3(1) of the ultimate

⁸⁸⁴ *United Nations Conference for the Adoption of a Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Official Records, Volume I* (UN Doc E/CONF.82/16) 77-8. The Article numbers changed in the Convention as adopted.

⁸⁸⁵ But see *Proceeds of Crime etc.* 238-249.

⁸⁸⁶ See 299.

Convention) has been said to be "the cornerstone of the Convention...designed to focus on the fundamental law enforcement measures necessary to combat the dual problems of international drug trafficking and money laundering...an all-inclusive list of illicit drug trafficking offences"⁸⁸⁷.

Article 2 went on to require parties to "adopt such measures as may be necessary to enable [them] to identify, trace, freeze or seize proceeds...for the purpose of the eventual confiscation" and to empower courts to order that bank, financial and commercial records should be made available. It was also contemplated that if the proceeds of crime had been intermingled with property acquired from legitimate sources that property should be liable to confiscation up to the value of the criminal proceeds and that property into which the proceeds of crime had been transformed should be liable to the measures desiderated in the Convention in lieu of the original proceeds themselves. Moreover parties were to consider the reversal of the onus of proof as regards the legitimacy of proceeds or other property liable to confiscation.

The essential features of DTOA are summarised above. On the basis of that summary and the foregoing summary of the proceeds of crime provisions of the 1988 UN draft it may be said that UK law was already largely consistent with what was being discussed. Although it was to prove necessary to extend the UK's money laundering legislation so as to bring it fully into compliance with the Convention, there was no material conflict of policies between existing UK law and either the 1988 UN draft or the Convention itself. It was perhaps for this reason that the UK's negotiating profile in relation to both money laundering and confiscation was quite low.

Only one intervention by the UK is of any real significance for the present work. It related to the subjection to constitutional limitations, legal system and domestic law of the requirement to criminalise acquisition, possession or use of property knowing that such property is derived from illicit traffic. The formula

⁸⁸⁷ *Report of the United States Delegation to the United Nations Conference for the adoption of a Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, reproduced in

was derived from Article 36 of the Single Convention on Narcotic Drugs, 1961⁸⁸⁸. In the Convention as adopted, it became a reference to the "constitutional principles [of each State Party] and the basic concepts of its legal system"⁸⁸⁹. The requirements qualified by this chapeau constitute what the US delegation described as "the permissive category of offenses that the Parties are obligated to establish as offenses under their domestic law"⁸⁹⁰.

We are told by the US delegation that the chapeau was adopted for a number of reasons⁸⁹¹. In particular, there was concern that those criminal justice systems which do not allow prosecutors the kind of discretion to be found in the common law and Scottish systems⁸⁹² would otherwise be obliged to create offences which would strike at innocent conduct as well as guilty. Without an effective prosecutor's discretion there would be no means of avoiding the prosecution of innocents. The second reason for the chapeau was the variation from system to system in the treatment of the offence of conspiracy and the third was concern at the potential interaction of the matters dealt with in Article 3 paragraph (1)(c) with the fundamental concepts of certain legal systems, such as the First Amendment to the US Constitution. Sproule and St Denis point out⁸⁹³ that similar concerns were felt by many delegations.

The chapeau had been the subject of some discussion in the course of the preparatory work. There was a view that the inclusion of such a chapeau would "have the undesirable effect of weakening one of the basic articles of the draft convention; the undertaking by States to punish the illicit traffic should be

WC Gilmore, *International Efforts to Combat Money Laundering*, Grotius, 1992, 100-101.

⁸⁸⁸ WC Gilmore, *Combating International Drugs Trafficking...*, 7.

⁸⁸⁹ Article 3, paragraph (1)(c).

⁸⁹⁰ *Report of the United States Delegation to the United Nations Conference for the Adoption of a Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, reproduced in WC Gilmore, *International Efforts to Combat Money Laundering*, Grotius, 1992, 98, 103).

⁸⁹¹ *Loc cit.*

⁸⁹² For detailed but dated accounts of prosecutorial discretion in Scotland, see AV Sheehan, *Criminal Procedure in Scotland and France*, HMSO, 1975, 136; and Susan R Moody and Jacqueline Tombs, *Prosecution in the Public Interest*, Scottish Academic Press, 1982, chapters 3 and 4. For a more up-to-date, and official version, see *Crown Office and Procurator Fiscal Service Annual Report 1992/93*, HMSO, 1993, 15.

⁸⁹³ D Sproule and P St Denis, *op cit.*

mandatory and Parties to the Convention should be ready to adjust their national legislation to the requirements of its provisions"⁸⁹⁴. Others argued, however, that "certain States might find it difficult under their constitutional and legal systems to apply fully and effectively some of the far reaching provisions of the article and that some form of limitation clause was consequently necessary"⁸⁹⁵.

When the issue arose at the Conference to Adopt, the UK said that "it would be unfortunate to eliminate the safeguard clause altogether, since it would be inappropriate to impose on States obligations incompatible with their legal system, with the result that a number of countries would be unable to accept the convention at all. Consideration should rather be given to what changes in domestic law might be required"⁸⁹⁶.

Two things may be said about this. First, since the UK in fact legislated without apparent difficulty on the basis of these provisions⁸⁹⁷, the UK intervention was presumably not for the purpose of preserving its own position. Rather, the concern the UK showed about the possibility of some States not being able to become Parties to the Convention at all is consistent with the point made in the context of the extradition provisions of the Convention.⁸⁹⁸ The UK's approach seems to have been driven by a desire to achieve the widest possible measure of agreement and participation in the Convention.

Secondly, however, and notwithstanding what has just been said, the UK's approach does seem to have been one which assumed a priority for municipal law. The UK did not align itself with those who, in the preparatory meetings, had maintained that states with a problem would just have to change their municipal law. The consequence which the UK foresaw if the chapeau was not included was not enforced change in municipal law but rather an absence of participation in the

⁸⁹⁴ *Report of the open-ended intergovernmental expert group...* 23 October 1987, para 48.

⁸⁹⁵ *Ibid*, para 49.

⁸⁹⁶ *United Nations Conference for the Adoption of a Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances: Official Records, Volume II* (UN Doc E/CONF.82/16/Add.1) 55.

⁸⁹⁷ See 261 below.

⁸⁹⁸ See 103 above.

Convention. It could, of course, be said of this that, since no State can be compelled to give its assent to a treaty and there is no question of the 1988 UN Drugs Convention having been a codification of customary norms (much less of peremptory norms), the UK's concerns about an absence of participation simply reflected the fact that any multilateral treaty represents the lowest common denominator of what states can agree and the more demanding the treaty the greater the political will that is required to secure participation. Nevertheless, the record of discussion in the preparatory phase demonstrates that some states expected that a hard line in the Convention would lead, not to refusals to participate but to changes in municipal law, even of a quite fundamental kind (since the reference they wished to remove was to constitutional principles). The fact that the UK did not take such a view and that the UK was concerned that municipal law might for some states constitute a barrier to participation may be seen as weak evidence of the UK's assumption that municipal law takes priority; but it would be dreadfully easy to push this too far. The intervention was only two sentences long and its greatest significance lies in its consistency with what has been noted in other contexts.

Because even the earliest drafts of the 1988 UN Drugs Convention were substantially compatible with DTOA, the possibility that municipal law might constrain what the UK was prepared to accept in a treaty, in the way section 4(2) of the 1989 Act does in an extradition context, did not arise. UK municipal law may be said to have influenced the content of the 1988 Convention to the extent that the UK was anxious to secure the widest possible coverage and supported wording which tended towards that result; but (especially because nobody was arguing for a particularly restrictive approach) this is municipal law influence at its weakest.

Article 7 of the Convention is a mutual legal assistance treaty-within-a-treaty. It runs to 20 paragraphs but is not especially innovative as mutual assistance arrangements go. As is common in such arrangements, the Parties are

obliged to afford one another “the widest measure of mutual legal assistance”⁸⁹⁹ and this applies as early as the investigative stage. The assistance required is to extend to search and seizure⁹⁰⁰ and it is specifically provided that mutual assistance cannot be refused on the ground of bank secrecy. This should be seen against the background of Article 5(4), which obliges Parties in whose territories proceeds, property or instrumentalities are situated to render assistance by way of tracing, freezing and confiscation.

Article 7(20) contemplates “the possibility of concluding bilateral or multilateral agreements or arrangements that would serve the purpose of, give practical effect to, or enhance the provisions of” the Article. In 1994, the UK developed a model for such agreements and has concluded a considerable number. The model is considered below⁹⁰¹. Meanwhile, Commonwealth Law Ministers, meeting in 1990, revised the Harare Scheme so as to make provision for tracing, seizing and confiscating the proceeds and instrumentalities of crime⁹⁰². The amendments to the Harare Scheme simply “provide a framework for co-operation between Commonwealth Governments in tracing and seizing the proceeds and instrumentalities of crime”⁹⁰³ and offer only the most basic provisions. The effect is that many Commonwealth members, including the UK, are subject as regards drug trafficking to the obligations accepted under Article 7 of the UN Drugs Convention but, as regards other types of predicate offence, are Party to the less formal, non obligatory arrangements under the Scheme.

The 1990 Act

We have dealt with Part I of the 1990 Act as regards mutual legal assistance. Section 14 of the Act extended UK money laundering law so as to create the offence of concealing or transferring the proceeds of drug trafficking, which was necessary in order to ensure compliance with Article 3(1)(b) and (c) of the 1988

⁸⁹⁹Article 7(1).

⁹⁰⁰Article 7(2)(c).

⁹⁰¹Page 286.

⁹⁰²Articles 26-28.

⁹⁰³Commentary by Professor David McClean.

UN Convention. According to the Notes on Clauses⁹⁰⁴, the intention of the clause was "to meet the terms of Article 3 of the Vienna Convention"⁹⁰⁵. The Speaking Note is not otherwise available and, because it sets out exactly what the UK was intending to do, it bears quotation in full. The Minister was offered text which said that the clause:

"1... seeks to fill the gap between our existing money laundering offence under section 24 of the Drug Trafficking Act 1986 and the rather wider offence set out in Article 3 of the Convention.

2. The position is this. Section 24 created an offence of being concerned in an arrangement whereby a drug trafficker is assisted to retain the benefit of drug trafficking. The key to the offence is that the defendant knew or suspected that the person whose property he was dealing with was a drug trafficker. Section 24 also requires that the arrangement must be for the benefit of the drug trafficker whose proceeds are the subject of the arrangement.

3. The Convention offences, on the other hand, turn on the nature or source of the property itself. They cover the situation where anybody—including the drug trafficker himself⁹⁰⁶—deal with proceeds in such a way as to avoid prosecution or the making, or enforcement of, a confiscation order against any person.

4. Accordingly, subsections (1) and (2) of the new clause give effect to Article 3(b)(1) and (ii) of the Convention by creating new offences of concealment, disguise, conversion or transfer of proceeds for the purpose of avoiding prosecution or confiscation. Similarly subsections (3) and (5) give effect to the Convention by creating an offence of acquiring property

⁹⁰⁴ Copy on file with author.

⁹⁰⁵ That is, the 1988 UN Drugs Convention.

⁹⁰⁶ Not all states interpret the Convention as requiring the criminalisation of money laundering carried out by the person who commits the predicate offence. Article 6(2)(b) of the Council of Europe Convention on the Laundering, Search, Seizure and Confiscation of the Proceeds from Crime is drafted on the assumption that the 1988 Convention does not require such criminalisation.

knowing or having reasonable grounds to suspect that it is the proceeds of drug trafficking".

There are 2 things to be said about this. The first is that what the Government did not make clear at the time is that in two respects section 14 went further than the Convention required. The first of these related to the mens rea of the offence. The Convention only required that those with knowledge of the criminal provenance of the property in question should be made liable to conviction. Section 14(2) of the 1990 Act subjects to criminal liability a person who knows or has reasonable grounds to suspect that provenance. Although it is true to say that Article 3(3) of the Convention provides that knowledge may be inferred from "objective factual circumstances", section 14(2) goes further than that. Having reasonable grounds to suspect something falls short of actual knowledge, and whilst both Scots law and English law are accustomed to inferring knowledge from circumstances⁹⁰⁷, neither treats reasonable grounds for suspicion as the same as actual knowledge (or the reference to reasonable grounds for suspicion in section 14(2) would have been unnecessary). It would be true to say that liability where there are reasonable grounds for suspicion is consistent with Article 6(3) of the Laundering Convention, which contemplates criminal liability where the offender "ought to have assumed that the property was proceeds"; but the Laundering Convention was not completed until several months after the 1990 Act received Royal Assent. It might be that those who made the policy for the 1990 Act knew that the Laundering Convention was to include such a provision and anticipated it. This, however, is speculative; nothing was said on the subject at the time.

It is, then, true to say that section 14 was heavily influenced by the 1988 UN Drugs Convention; but it is also true to say that the UK went beyond the requirements of the Convention. That bespeaks a situation in which the Convention was more an opportunity than an obligation. Indeed, Article 24 of the Convention seems to contemplate just such a possibility when it provides that a

Party may adopt more strict or severe measures than those provided for by the Convention.

The second thing to say about the speaking note provided for the Minister is that the Scottish offence equivalent to DTOA section 24 was not mentioned. It must, of course, be tedious for Home Office officials always to have to give Scottish equivalents but it would, nevertheless, make understanding the changes effected in Scots law by UK legislation slightly easier if that was done. The fact that it is not done simply underlines the fact that the tandem desiderated by the Renton Committee is not yet being ridden by the Westminster Parliament.

The section creates offences with several variations. Certain elements are common to all the variations and they are also to be found in other money laundering offences. The first element is that there is property which is, or in whole or in part directly or indirectly represents, a person's proceeds of drug trafficking. "Property" is not as such defined and we must fall back on the ordinary meaning of the concept, informed by the intention of the legislation which is to strike at that which has value. Some assistance may be gained from Article 1(q) of the Convention, which defines "property" as "assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to, or interest in, such assets".

The property concerned must be or represent the "proceeds of drug trafficking", an expression which requires to be understood in the light of what is now section 49 of the Proceeds of Crime (Scotland) Act 1995, which makes it clear that the expression is not restricted to UK drug trafficking, much less to trafficking in a particular jurisdiction within the UK⁹⁰⁸. Finally, there must be an intention to avoid one (or more) of three things, namely prosecution for a drug trafficking offence, the making of a confiscation order or the enforcement of such an order.

Section 14(1)(a) may be thought of as dealing with the situation in which

⁹⁰⁷ *Alison* i, 330; *R v Hall (Edward)* [1985] Crim LR 337.

⁹⁰⁸ Section 49(2).

the relevant property is retained by the trafficker in its existing place and state, subject to the taking of steps-concealment or disguise-to make it appear other than it is. Section 14(1)(b) may be thought of as dealing with the situation in which more active steps-conversion, transfer or removal from the jurisdiction-are taken to launder the asset(s). These concepts are subject to a degree of overlap and it will not always be easy, or necessary, to determine, for example, where concealment ends and disguise begins. The intention seems to be that the provision will be capable of application to any dealing with property in which the prosecutor has been able to prove the purpose set out in the section. In particular, section 14(4) provides that "references to concealing or disguising any property include references to concealing or disguising its nature, source, location, disposition, movement or ownership or any rights with respect to it." This is derived directly from Article 3(1)(b)(ii) of the 1988 UN Drugs Convention.

The Council of Europe Laundering Convention

The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime was opened for signature on 8 November 1990, the draft being prepared over a series of meetings between 1987 and 1990. The 1988 UN Drugs Convention was, therefore, adopted during the period of discussion of the Laundering Convention. It played an important role in the eventual form of the Laundering Convention and a conscious effort was made to ensure that the definitions in particular were in harmony⁹⁰⁹. This was, no doubt, rendered easier by the fact that some at least of the delegates at the committee of Governmental experts who met under the authority of the European Committee on Crime Problems ("CDPC") also participated in the negotiations which produced the 1988 UN Drugs Convention⁹¹⁰. The important difference between the Laundering Convention and the 1988 UN Drugs Convention is that the

⁹⁰⁹ See the comments of the Secretary to the Expert Group which prepared the Laundering Convention: HG Nilsson, "The Council of Europe Laundering Convention: A Recent Example of a Developing International Criminal Law" 2 *Criminal Law Forum* 426 (1991).

⁹¹⁰ Mr G Polimeni of Italy chaired both the Committees of the Whole at Vienna and the Council of Europe Select Committee.

Laundering Convention is not restricted to drug trafficking offences. It was considered that the "predicate offences" upon which the operation of the Laundering Convention is based should include drug trafficking, terrorist offences, organised crime, violent crimes, offences involving the sexual exploitation of children and young persons, extortion, kidnapping, environmental offences, economic fraud, insider trading and other serious offences.

Unfortunately, from the point of view of the present work, it is not possible to attribute the particular contributions made by individual national delegations to the development of the Laundering Convention. That is a matter of deliberate policy on the part of the Council of Europe, which proceeds on the basis that "European Conventions are elaborated by committees of Governmental experts... [T]hey...follow, in their proceedings, the general customs of diplomacy, including that of deliberating behind closed doors. Moreover, committee members, although appointed by Governments, are not delegates but independent experts who sit on the committee in their personal capacity: they are not bound by instructions from their capitals and cannot engage their Governments' responsibility. This status enhances their personal independence and enables them to agree to European solutions on the basis of an objective assessment of the legal problems involved. They do not, as delegates would, only voice their Governments' policy thinking"⁹¹¹. The records of the discussions during the preparation of the Convention are, therefore, not available.

Chapter II of the Convention is concerned with "measures to be taken at national level". These include confiscation⁹¹² and the criminalising of money laundering⁹¹³, both of which are straightforward enough. As the Explanatory Report makes clear⁹¹⁴, the provisions of Chapter II are substantially influenced by the 1988 UN Drugs Convention, though they represent some slight widening of the types of conduct covered and a very substantial widening of the categories of

⁹¹¹ H-J Bartsch, *op cit*, 207.

⁹¹² Article 2.

⁹¹³ Article 6.

⁹¹⁴ Paras 22-34.

predicate offence; Article 1 defines “proceeds” as “any economic advantage from criminal offences”, without restriction, and “predicate offence” as “any criminal offence as a result of which proceeds were generated”. The application of the remainder of the Convention follows from that. The general detail of these provisions is, with two important exceptions, of limited significance for us because the UK was able, on 28 September 1992, to deposit its instrument of ratification without having been required to legislate at all.

The first exception relates to Article 6, which required the criminalisation of money laundering. Although the UK had, in the 1990 Act, extended its legislation so as to cover drugs money laundering as described in the 1988 UN Drugs Convention, it had not, in 1992, yet legislated to make the laundering of the proceeds of all crimes an offence. That was to be done in the Criminal Justice Act 1993.

The other exception relates to Article 2, which requires parties to “adopt such legislative and other measures as may be necessary to enable it to confiscate instrumentalities and proceeds or property the value of which corresponds to such proceeds”. Since Scotland did not have an all-crimes confiscation regime (unlike England and Wales which had such a regime in the Criminal Justice Act 1988) it was not possible for the UK to comply in Scotland with Article 2 except as regards drug trafficking. That was not permitted to stand in the way of ratification, however, and a reservation was made so that Article 2 should apply only to offences which constituted drug trafficking as defined in Scottish legislation. It was April 1, 1996 with the coming into force of the 1995 Act before Scots law was put in a position to comply fully with the requirement to confiscate on the basis of all kinds of predicate offences and only on 1 May 1999 that it was possible to do so on behalf of other countries⁹¹⁵.

Chapter III of the Convention deals with international co-operation. Here, the Council of Europe experts had the opportunity to draw upon not only the 1988 UN Drugs Convention but also ECMA. Indeed, the Explanatory Report tells us

that it was intended that “to the extent that the scope of application of the present Convention and the European Convention on Mutual Assistance in Criminal Matters converge, parties should, if no reasons to the contrary exist, endeavour to use the latter convention”⁹¹⁶. Since, as we have seen, the UK does not require a treaty basis for most sorts of mutual assistance, the treaty under which requests are made is largely immaterial. However, Articles 11 to 17 which deal with assistance by way of “provisional measures” and by way of confiscation go rather beyond what is contemplated by ECMA. The “provisional measures” contemplated by the Laundering Convention include “freezing or seizing, to prevent any dealing in, transfer or disposal of property which, at a later stage, may be the subject of a request for confiscation or which might be such as to satisfy the request”⁹¹⁷. These are the matters dealt with in UK law by restraint orders and, whilst the facility for search or seizure contemplated by Article 5 ECMA might in some cases be apt to meet the obligation, in many cases something more is required. It should be recalled that ordinary domestic powers of search were not considered to be adequate at the time DTOA and the 1987 Act were enacted and that section 8 of the 1990 Act, which makes search and seizure in Scotland available as a means of mutual assistance, only provides the sheriff with power to grant warrant equivalent to that which he can grant at common law in a municipal case. Critically, however, Article 13(1) of the Laundering Convention provides that the procedures for obtaining and enforcing confiscation are to be governed by the law of the requested party. Until the 1995 Act came into force, that meant that confiscation of the proceeds of non drug crime⁹¹⁸ was not available in Scotland.

Article 39 of the Laundering Convention contemplates the making of bilateral agreements on the matters dealt with in the Convention for purposes of supplementing or strengthening its provisions or facilitating the application of the

⁹¹⁵See 299 below.

⁹¹⁶Para 36. The context is assistance in identifying and tracing property but the meaning seems intended to be wider than that.

⁹¹⁷Article 11(1).

⁹¹⁸And non-terrorist crime.

principles embodied in it. The UK has developed a model bilateral agreement⁹¹⁹ to serve this purpose, which is of interest because it at once indicates the matters as to which the UK wishes particular procedures to be followed and also where the UK wishes to ensure that the Convention takes effect as widely as possible. The desire for width of application is evident from 2 references to property being available for provisional measures or confiscation irrespective of its relationship to the offence or offences for which the order may be imposed⁹²⁰. The matters as regards which the UK wishes particular procedures to be followed are traceable to the needs of municipal law and include the provision of certified copy documents⁹²¹ (so making proof in a UK court of what has happened in a foreign jurisdiction much easier) and evidence of the commencement or intended commencement of proceedings⁹²² (so making it possible to satisfy section 29(2) and (3) of the 1995 Act as regards the granting of restraint orders).

The EC Directive on prevention of the use of the financial system for the purpose of money laundering

The Directive was adopted by the Council of Economic and Finance Ministers on 10 June 1991. It occupies a pivotal position in the development of UK money laundering law and is therefore of considerable significance for this part of the thesis. The Directive was based on the 1988 UN Drugs Convention, the Basle Statement of Principles, recommendations of FATF and the Laundering Convention; and it provided the occasion for the substantial expansion of UK money laundering law effected by part of the Criminal Justice Act 1993 and by the Money Laundering Regulations 1993⁹²³.

Excursus: the First Pillar and criminal law

The UK has tended to emphasise the relationship between criminal law and national sovereignty rather more than most member states and to take the view that the EC has no competence in criminal law matters. This was spelled out in

⁹¹⁹Reproduced in Gilmore, *Mutual Assistance in Criminal and Business Regulatory Matters*, 260.

⁹²⁰Articles 3 and 4.

⁹²¹Article 3(2).

⁹²²Article 8(a).

the context of the consideration by the House of Lords Select Committee on the European Communities of the Proposal for a Money Laundering Directive⁹²⁴. As the Committee summarised the position, "the Treasury in their Explanatory Memorandum stated that as presently drafted Articles 2, 5(1) and 6 of the Directive 'relate to the field of criminal law and therefore are outside Community competence'. As described more precisely in oral evidence, the United Kingdom Government's objection is that the Community cannot require the imposition of measures or penalties of a specifically criminal character. It may require the imposition at national level of sanctions or penalties of sufficient gravity to deter certain conduct, but it is for the national authorities to exercise their judgement as to whether these sanctions should be of a civil, administrative or criminal character"⁹²⁵. This position was implicitly based on the truism that Community law has no criminal law element as such. At the time of the establishment of the Communities there was no desire to cover criminal law and that was left within the sovereign jurisdiction of the Member States⁹²⁶. The Select Committee was not, however, persuaded by the Government point of view. It pointed out that nothing in the treaties excludes national criminal law from the ambit of Community law and laid emphasis on the argument made by Advocate General Lenz in *Cowan v Trésor Publique*⁹²⁷ that "for the assessment of a legal rule from the point of view of Community law what is important is not the area of law in which it is found but its substantive content". In other words, it is not the civil, administrative or criminal law character of the procedure selected which matters but whether the substantive matters dealt with are within the scope of Community law. In a memorandum submitted to the Select Committee, Smith and others pointed out

⁹²³ SI 1993 No 1933.

⁹²⁴ Session 1990-91; 1st Report (HL Paper 6).

⁹²⁵ *Op cit*, 15.

⁹²⁶ Hanna G Sevenster, "Criminal Law and EC Law" (1992) 29 CMLR 29; Julian JE Schutte, "The European Market of 1993: A Test for a Regional Model of Supranational Criminal Justice or of Inter-Regional Co-operation", in *Principles and Procedures for a New Transnational Criminal Law* (ed Albin Eser and Otto Lagodny), Max Planck Institute for Foreign and International Criminal Law, 1992, 387; Fleur Keyser-Rignaldi, "European Integration with regard to the Confiscation of the Proceeds of Crime" (1992) *European Law Review* 499, 502.

that obligations to change criminal law had been imposed on member States by a range of Community law obligations. They gave examples and concluded that "it is not *per se* outside the competence of the Community to engage in the harmonisation or co-ordination of issues of criminal law for purposes which come within the wider objective of the Treaties"⁹²⁸. By way of example, we may cite *Criminal Proceedings against Calfa*⁹²⁹, in which the ECJ held that a sentence of a Greek criminal court, pursuant to national legislation, excluding an Italian national from Greece for life following his conviction of drug trafficking was precluded by those provisions of the EC Treaty and a Directive⁹³⁰ which deal with the freedom for recipients of services (in this case, tourism) to go to another member state to receive them.

The UK Government did not support its position with a legally reasoned argument and it is suggested that it is a position which owed more to politics than to legal analysis. As Sevenster has said, "both the Treaties and secondary Community law are sources of obligations on Member States in the sphere of criminal law. An analysis of the case law of the Court of Justice of the EC...shows that the sovereignty involved-at least if taken in an absolute sense-has become an illusion"⁹³¹. The corollary of this, and of the House of Lords Select Committee's analysis, is that some aspects of criminal law are within the scope of Community competence and hence within the First Pillar arrangements. The *general* position, however, is as stated by Cullen: "Criminal law remains within the jurisdiction of the Member States. It is not immune to indirect influence by norms of Community law but the Community lacks any general competence to create substantive

⁹²⁷ Case 186/87, [1989] ECR 195.

⁹²⁸ Memorandum by Raymond Smith, David Freestone and Patrick Birkinshaw, reproduced in Select Committee Report, Written Evidence, 30.

⁹²⁹ Case C-348/96; *Times Law Report*, January 21st 1999.

⁹³⁰ Council Directive 64/221/EEC of February 25 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health.

⁹³¹ *Op cit*, 29.

offences or to prescribe criminal penalties"⁹³².

Baker has criticised as outdated the perspective that the economic origins of the EC mean that its influence upon criminal justice matters has been "specialised, of marginal interest, and as serving a regulatory rather than a 'truly criminal' purpose"⁹³³. Consideration of the effect of the Money Laundering Directive below will demonstrate that, in that case at least, the influence of EC law has gone well beyond the merely regulatory. It will also demonstrate, however, that the Directive was originally explained as having an essentially regulatory purpose. Examination of the examples given in the literature of EC influence on criminal law suggests that, so far, most influence has indeed been in areas with a regulatory flavour⁹³⁴. This, it is suggested, reflects the areas with which EC law has in practice been concerned rather than any issue of underlying principle.

It is already the case that when a Member State in fact uses the criminal law to fulfil an obligation which it has in Community law, EC law will be relevant in the criminal court. In the case of tachograph equipment, for example, the UK legislation⁹³⁵ refers to and adopts the Regulation⁹³⁶ in such a way that the charge which the accused faces refers explicitly to EC law⁹³⁷ and the Court might well refer to the case law of the ECJ in coming to a decision⁹³⁸. In such cases, and in other cases where EC law is in fact relevant, Article 177 EC provides for the referring of questions of EC law to the ECJ for decision (though in *R v Carrier*⁹³⁹ the English Court of Appeal refused to make a reference, even though the parties were agreed that it should be made, on the ground that the two years' delay which

⁹³² Peter Cullen, "Fraud against the Community Budget: a common concern" ECTJ 3/2 [1999] 61, 68.

⁹³³ Estella Baker, "Taking European Criminal Law Seriously" [1998] Crim LR 361, 363.

⁹³⁴ See the examples given in Janet Dine, "European Community Criminal Law?" [1993] Crim LR 246.

⁹³⁵ The Transport Act 1968 s97(1).

⁹³⁶ Council Regulation 3821/85 (EEC).

⁹³⁷ See the charge reproduced in *Reith v Skinner* 1996 SCCR 506.

⁹³⁸ In *Reith v Skinner*, the High Court referred to *Pierre Goupil*, ECJ 21 March 1996, Case C-39/95 and to *Mrozek v Jager*, ECJ 21 March 1996, Case C-335/94.

⁹³⁹ [1994] 1 CMLR 457.

this would induce would do substantial harm to the fairness of the trial and in *Westwater v Thomson*⁹⁴⁰ the High Court refused to make a reference on the ground that the answer to the point at issue was so obvious that a reference was unnecessary). For Scots criminal law, the mechanism is provided by Chapter 31 of the Act of Adjournment (Criminal Procedure Rules) 1996. Such references from Scotland have not been very frequent and have not related to anything which could be said to be in the mainstream of criminal law. Renton and Brown cites only 2 examples of the procedure⁹⁴¹, both of which relate to fisheries regulation. Nevertheless, the possibility is there and provides a means by which the ECJ can influence Scots criminal law in a direct way.

To this we should add reference to sections 29 and 57 of the Scotland Act 1998. Section 29(2)(d) provides that legislation of the Scottish Parliament will be outside the Parliament's competence, and hence not law, if it conflicts with Community law. Section 57 (2) provides that a member of the Scottish Executive has no power to do any act which is incompatible with Community law. We shall not analyse these provisions beyond noting that they place Community law in the same situation as the (ECHR derived) Convention rights under the Scotland Act⁹⁴². How far they affect Scottish criminal law in the future will depend on how far Community competence extends into the criminal law sphere and also on how alive Scottish practitioners come to be to Community law issues.

The UK approach to the Directive

In attempting to determine the UK contribution and attitude to the Directive as it finally stood, we can derive considerable assistance from the Money Laundering Report of the House of Lords Select Committee on the European Communities⁹⁴³. The Committee had before it the Draft Directive⁹⁴⁴ and decided to examine three questions in particular. These were, first, whether the Directive is a necessary

⁹⁴⁰ 1992 SCCR 624.

⁹⁴¹ Paras 37-03; *Wither v Cowie*, *Wither v Wood* 1990 SCCR 741; *Walkinshaw v Marshall* 1991 SCCR 397.

⁹⁴² As to which, see 58 above.

⁹⁴³ *Op cit.*

⁹⁴⁴ 5611/90 (COM(90)106).

addition to other international instruments, secondly whether the Community had the competence to promulgate the Directive and, thirdly, whether the proposed duties of supervision and informing were too wide⁹⁴⁵.

In the course of considering these questions the Committee took evidence from Treasury and Home Office officials and the Minutes of Evidence are annexed to the Report⁹⁴⁶. The officials concerned were both closely involved in the development of UK proceeds of crime policy and it seems safe to proceed on the basis that the answers they gave, together with the memoranda submitted by Treasury, represent an accurate statement of the UK perception of developments⁹⁴⁷.

The Commission Proposal for the Directive was accompanied by an Explanatory Memorandum, reproduced at Appendix 3 to the Select Committee Report. It was explained there that, whilst money laundering "must mainly be combatted by penal means...and in the framework of international co-operation among law enforcement agencies and judicial authorities...a penal approach should not be the only strategy to combat money laundering since, as credit and financial institutions are frequently used to carry out these kinds of activities, the soundness and stability of the particular institutions involved as well as the prestige of the financial system as a whole could be seriously jeopardised". It was asserted on this basis that "the Community, which is responsible for adopting the necessary measures to ensure the soundness and stability of the European financial system, cannot be indifferent to the involvement of credit and financial institutions in money laundering". Concern was expressed about the possibility that the market would be distorted if EC Member States proceeded at different speeds which would have had the effect that the costs associated with compliance would have affected the financial industry unevenly across Europe.

⁹⁴⁵ Report, para 4.

⁹⁴⁶ References to the evidence are given here in the form: Minutes [].

⁹⁴⁷ The principal Explanatory Memorandum submitted by Treasury was signed by the Economic Secretary to the Treasury.

The UK supported "the broad thrust of the EC proposal"⁹⁴⁸. It was noted⁹⁴⁹ that the substance of the draft Directive followed closely the Recommendations of FATF and it was asserted⁹⁵⁰ that "the Government attaches high priority to the war against drugs and money laundering. Internationally, the UK has played a leading role in taking measures against money laundering". Nevertheless, the Treasury Memorandum put down the marker that "it is arguable that provisions in Article 2, 5(1) and (6) of the Directive relate to the field of criminal law and therefore are outside Community competence"⁹⁵¹.

The proposition that an absence of Community competence followed necessarily from the fact that a matter related to criminal law was demolished, at least to the satisfaction of the Select Committee, in a memorandum submitted by 3 scholars from Hull University⁹⁵² and their argument is summarised above⁹⁵³. It is clear that the UK was at odds with the Commission on the point. Supplementary evidence given by Treasury, describing events at the Council of Finance Ministers on 8 October 1990, explained⁹⁵⁴ that the UK "along with most other Member States" considered that provisions related to the field of criminal law were outside Community competence. The UK had therefore "with the support of a large majority of other Member States" suggested that the approach adopted in the Insider Dealing Directive⁹⁵⁵ should be followed. That approach was to impose on member States a series of obligations to "prohibit" certain conduct⁹⁵⁶, whereas Article 2 of the draft Money Laundering Directive would have required Member States to ensure that money laundering was "treated as a criminal offence".

The UK's suggestion was put into effect and Article 2 was amended so that it merely requires the prohibition of money laundering. This was supplemented by

⁹⁴⁸ Treasury Memorandum, Minutes 10.

⁹⁴⁹ Minutes 9.

⁹⁵⁰ Minutes 10.

⁹⁵¹ Minutes 30.

⁹⁵² Minutes 11.

⁹⁵³ 271.

⁹⁵⁴ Minutes 11.

⁹⁵⁵ Council Directive 89/592 EEC (OJ L334/30).

⁹⁵⁶ The word "prohibit" had been used even in the draft of that Directive-see [1987] 2 CMLR 765.

a Statement in which the Member States, recalling their signatures to the 1988 UN Drugs Convention and the Laundering Convention and conscious of the derivation from those instruments of the Directive definition of money laundering, undertook to "take all necessary steps by 31 December 1992 at the latest to enact criminal legislation enabling them to comply with their obligations under those instruments"⁹⁵⁷. The date selected was that by which compliance with the Directive was required to be achieved.

As this Statement anticipated, the UK did in fact use criminal law to implement the Directive. It was the requirement to do so to which the UK objected, rather than the proposition that money laundering should be an offence. Mr A Harding of the Home Office made the position clear to the Select Committee: "We are very concerned at the implication for Community competence of purported Community law that would require the creation of criminal offences and also, as the draft Directive would do, would go into the area of the enforcement of criminal law. Those have seemed to us very much matters for Member States to handle, those matters that go very directly to issues of sovereignty, and the United Kingdom would indeed be very concerned if such a precedent were set"⁹⁵⁸.

The issue, then, had nothing to do with money laundering. The argument was about the limits of Community competence generally and money laundering merely provided the context. Since the UK adopts a dualist position as regards international law, refusal to participate in a treaty has no legal consequences. A Directive is binding⁹⁵⁹ and failure to implement a Directive renders Member States open to proceedings in the European Court of Justice under Article 169 EC. Voting procedure as regards the Directive was by qualified majority⁹⁶⁰ which is

⁹⁵⁷ Statement by Representatives of the Governments of the Member States of the European Communities Meeting within the Council Concerning the Council Directive of 10 June 1991 (OJ L166/83).

⁹⁵⁸ Minutes 13.

⁹⁵⁹ Article 189 EC.

⁹⁶⁰ Minutes 10.

true of Directives over a wide range of subjects⁹⁶¹. The Luxembourg Compromise⁹⁶², under which there may be said to be a "quasi-veto", applies only where there is a vital national interest at issue and such interests tend to be defined narrowly⁹⁶³. It is in any event little used. If the UK is not assiduous in resisting the assertion of a Community competence to make requirements in the criminal law field there is at least a theoretical risk that a Directive might at some stage impose on the UK, against its wishes, obligations derived from international agreements in which the UK had declined to participate. Of course, if the House of Lords Select Committee was correct in its view that "there is nothing in the EEC Treaty or in other Community Treaties which excludes national criminal law from the ambit of national community law"⁹⁶⁴, that theoretical risk already exists.

The other issue which should be noted here is that of the scope of the Directive as regards predicate offences. The Proposal argued for its application to all serious crime⁹⁶⁵ but the Directive as adopted is restricted to drugs offences. This restriction was said by Treasury to have been suggested by the UK to minimise the complications arising from difficulties in agreeing a harmonised definition of serious crime⁹⁶⁶. This can probably be taken at face value, since the UK was to sign the Laundering Convention in November 1990 and plainly had no objection to expanding the concept of the predicate offence well beyond drug trafficking. It is of some interest, however, that the UK did not suggest dealing with the problem of defining "serious" crime by simply applying the Directive to "any criminal offence as a result of which proceeds were generated", following the model of Article 1 of the Laundering Convention. It is possible that the mindset of UK negotiators may have been limited by the restriction in English law of confiscation of the proceeds of non drug crime to cases prosecuted on

⁹⁶¹ David AO Edwards and Robert C Lane, *European Community Law: An Introduction*, 2nd edition, Butterworths, 1995, 27.

⁹⁶² Bulletin of the European Economic Community, No 3, 1966, 9-10.

⁹⁶³ Clive C Church and David Phinnemore, *European Union and European Community*, Harvester Wheatsheaf, 1994, 264.

⁹⁶⁴ Report 15.

⁹⁶⁵ Report 21.

indictment (with some limited exceptions) and with a threshold of £10,000 proceeds before the procedure applied.

It should now be said that, according to a Commission press release⁹⁶⁷, the recommendation of the Second Commission Report to the European Parliament and the Council on the implementation of the Money Laundering Directive⁹⁶⁸ that the need to keep the Directive up-to-date “argues strongly in favour of a widening of the range of predicate offences covered”⁹⁶⁹ has been accepted and that a new Directive is in preparation to achieve such widening. The Commission has, however, expressed concern that this will once again raise the issue of prohibition as opposed to criminalisation⁹⁷⁰.

As adopted, the Directive required Member States to prohibit money laundering and also to (i) impose a duty on credit and financial institutions, their directors and employees to report suspected money laundering to the enforcement authorities and at the authorities' request furnish them with all necessary information (Article 6); (ii) impose duties as regards the handling of suspicious transactions (Article 7); (iii) prevent institutions, their directors and their employees from disclosing to the customer concerned or to any third party that information has been passed by them to the enforcement authorities (Article 8); and (iv) provide immunity for disclosures in good faith of information to the enforcement authorities (Article 9). All of these were first implemented by primary legislation in the Criminal Justice Act 1993.

Other requirements of the Directive were capable of being implemented by secondary legislation made under section 2(2) of the European Communities Act 1972 and this was done with the Money Laundering Regulations 1993. The detail of these Regulations is considered below. The relevant requirements were to impose duties as to (i) the identification of customers (Article 3); (ii) the

⁹⁶⁶ Minutes 11.

⁹⁶⁷ “Money laundering: EU Directive to be extended”, 13 July 1998.

⁹⁶⁸ XV/1116/97-rev.2.

⁹⁶⁹ *Op cit*, 23.

⁹⁷⁰ *Loc cit*.

maintenance of records of identification and transactions (Article 4); (iii) the examination with special attention of any transaction particularly likely to be related to money laundering (Article 5); and (iv) the establishment and maintenance of adequate procedures of internal control and communication and staff training (Article 11).

The 1993 legislation

Following the adoption of the Directive, the UK Government set about overhauling UK money laundering law. In May 1992, as part of that exercise, the Treasury issued a consultation paper entitled *Implementation of the EC Money Laundering Directive* ("the 1992 consultation paper") in which there was stated the Government's assessment of how far UK law already satisfied the requirements of the Directive and what would require to be done to satisfy those requirements fully.

The position as the Government saw it was that UK law and practice was "to a considerable extent already in line with the provisions of the Money Laundering Directive" and that implementation would "essentially entail an elaboration and extension of existing law" rather than more fundamental change⁹⁷¹. From this starting point, the consultation paper went on to examine each of the UK's money laundering offences in light of the Directive and to identify the changes which would be required.

The assessment was that the duty to report suspected money laundering and furnish information⁹⁷², the requirements of the Directive as regards handling suspicious transactions⁹⁷³, the prevention of disclosure that information has been passed to the enforcement authorities⁹⁷⁴, the immunity for disclosures in good faith to the authorities⁹⁷⁵ and the duty on supervisory bodies to report⁹⁷⁶ would

⁹⁷¹ 1992 consultation paper, para 7.

⁹⁷² Article 6.

⁹⁷³ Article 7.

⁹⁷⁴ Article 8.

⁹⁷⁵ Article 9.

⁹⁷⁶ Article 10.

require to be implemented by primary legislation. Customer identification⁹⁷⁷, record keeping⁹⁷⁸, examination of transactions particularly likely to be related to money laundering⁹⁷⁹ and internal control and communication and staff training⁹⁸⁰ were all judged suitable for secondary legislation⁹⁸¹.

It was considered that in most respects DTOA section 24, its (unspecified) Scottish equivalent and section 14 of the 1990 Act satisfied Article 2 of the Directive. However, it was noted that the definition of money laundering in Article 1 of the Directive went beyond DTOA section 24 in that it extends to simple acquisition of or possession or use of the proceeds of trafficking, albeit with knowledge. It was therefore considered necessary to expand the existing money laundering offences to provide that a person who acquires, possesses or uses the proceeds of drug trafficking in the knowledge that they are proceeds commits an offence⁹⁸².

This was done in section 17 of the 1993 Act, which, for Scotland, inserted a new section 42A in the 1987 Act⁹⁸³ (now consolidated in section 37 of the (Consolidation) Act). Subsection (1) provided that "A person is guilty of an offence if, knowing that any property is, or in whole or in part directly or indirectly represents, another person's proceeds of drug trafficking, he acquires or uses that property or has possession of it. Article 2 of the Directive simply requires Member States to "ensure that money laundering as defined in this Directive is prohibited" and the definition in Article 1 includes "the acquisition, possession or use of property, knowing, at the time of receipt, that such property was derived from criminal activity or from an act of participation in such activity".

Although Article 2 of the Directive is the peg upon which section 17 of the

⁹⁷⁷ Article 3.

⁹⁷⁸ Article 4.

⁹⁷⁹ Article 5.

⁹⁸⁰ Article 11.

⁹⁸¹ 1992 consultation paper paras 8 and 9.

⁹⁸² 1992 consultation paper para 15.

⁹⁸³ Section 16 inserted a new section 26A, in identical terms, into DTOA.

1993 Act was hung, the legislation in fact went beyond what the Directive requires. The Directive only requires the prohibition of the acts described, whereas the legislation criminalises it. More subtly, and perhaps more important for the present purpose, the Directive only requires the prohibition of acquisition, possession or use of property if its criminal provenance is known at the time it is received. Section 17 however, was apt to deal with the case of a person who discovers that property which he already possesses has such a provenance and continues to possess it without availing himself of subsection (5)(b) which makes an exception in the case of a person who makes a disclosure to the authorities of his suspicion that the property is tainted as soon as it is reasonable for him to do so. In Scots law at least there is a clear parallel with the law of reset, under which "the person accused may originally have got the goods honestly, but if he afterwards finds that he got them from a thief, the moment he knows this he is guilty of reset, unless he takes steps at once by informing the police to show that he has no guilty intention with regard to the goods"⁹⁸⁴. This discrepancy may be traced to the 1992 consultation paper, where words very similar to those now appearing in the legislation are used⁹⁸⁵. It may be that the Treasury officials who drafted that consultation thought that they were paraphrasing the Directive accurately. The Home Office was the lead department for the 1993 Act and might or might not have noticed the point.

The Consultation Paper noted⁹⁸⁶ that Article 6 of the Directive required member States to ensure that financial institutions, their directors and employees reported on their own initiative facts and circumstances which might be an indication of money laundering, whilst Article 7 require that institutions should refrain from carrying out transactions until they have informed the authorities. It further noted⁹⁸⁷ that section 24 of DTOA, and its Scottish and Northern Irish equivalents, fell short of the requirements of Articles 6 and 7 in that they did not

⁹⁸⁴ *Gold v Nielson* (1907) 5 Adam 423 *per* Lord Justice-Clerk (MacDonald) at 431.

⁹⁸⁵ 1992 consultation paper para 15.

⁹⁸⁶ Para 17.

⁹⁸⁷ Para 18.

require the making of reports (they only provided a defence where a report was made) and did not apply to employees who became aware of (but were not themselves involved in) money laundering activity. It was therefore considered that there would have to be an offence whereby any person who, acting in the course of any trade, business or profession, knows or suspects that another person is engaged in money laundering, shall be guilty of an offence unless he discloses any matter on which that knowledge or suspicion is based to a constable as soon as practicable⁹⁸⁸. Such an offence was created by section 19 of the 1993 Act, which inserted a new section 43A into the 1987 Act⁹⁸⁹.

Once again, what the UK enacted went beyond what the Directive required. Articles 6 and 12 of the Directive limit the obligation to "credit and financial institutions and their directors and employees" and other professions and categories of undertaking "which engage in activities which are particularly likely to be used for money laundering purposes" but the offence created by the UK legislation, for both Scotland and England, applies to any person who acquires, in the course of his "trade, profession, business or employment" information founding a knowledge or suspicion that a person is engaged in drug money laundering.

Article 8 of the Directive deals with "tipping off" and provides simply that credit and financial institutions and their directors and employees shall not disclose to the customer concerned nor to other third persons that information has been transmitted to the authorities in accordance with Articles 6 and 7 or that a money laundering investigation is being carried out. The tipping off offence provided for by DTOA section 31 depended on an application having been made for a production order (under DTOA s27) or a search warrant (under DTOA s28) and it was considered that this required to be widened⁹⁹⁰. It was noted, however, that the tipping off offence under section 42 of the 1987 Act was not made to

⁹⁸⁸ Consultation Paper, para 19.

⁹⁸⁹ For full analysis, see Alastair N Brown, *Proceeds of Crime...*, 159. Section 18 inserted a new section 26B, in identical terms, into DTOA.

⁹⁹⁰ Consultation Paper para 22.

depend on such an application and that, accordingly, Scots law did not require to be amended. Nevertheless, section 19 of the 1993 Act inserted a new section 43B into the 1987 Act in terms which were the direct equivalent of the new provision introduced for English law by section 18⁹⁹¹ (inserting a new section 26C into DTOA). The new Scottish provision sat alongside section 42 of the 1987 Act and in due course both were consolidated in the (Consolidation) Act, section 42 becoming section 36 of the (Consolidation) Act and section 43B becoming section 40 of that Act⁹⁹².

Section 43B went rather beyond what was required by the Directive (as did DTOA section 26C). It followed what had been done in relation to the obligation to report suspicions in that it applied to everyone, rather than merely the institutions and limited class of persons referred to in the Directive. Furthermore, whereas the Directive merely sought to prohibit the disclosure to the customer or third parties that information had been transmitted to the authorities or that a money laundering investigation is being carried out, the section 43B offences (there were three of them) applied to the disclosure of anything likely to prejudice the investigation. All three offences also apply even where no investigation has yet commenced, provided that an investigation is in contemplation and the first of the offences applies even where there has been no disclosure but an investigation is contemplated.

In a Scots law context, this has to be seen in combination with section 42 of the 1987 Act (now section 36 of the (Consolidation) Act), subsection (1) of which already provided that "a person who, knowing or suspecting that an investigation into drug trafficking is taking place, does anything which is likely to prejudice the investigation is guilty of an offence". This is wider than the Directive in that it applies to everyone and not the limited class of persons identified in the Directive; it relates to investigations into drug trafficking, an

⁹⁹¹ There is a minor difference as regards the position of Customs Officers as recipients of disclosures (see Alastair N Brown, *Proceeds of Crime*...162) but that need not concern us here.

⁹⁹² For detailed analysis of section 36 of the (Consolidation) Act see Alastair N Brown, *Proceeds of Crime*...151; for such analysis of section 40 of that Act, see *ibid* 161.

expression which includes money laundering but is very much wider than that⁹⁹³; and it applies not merely to disclosing that information had been given to the authorities or that an investigation is being carried out but to the doing of anything at all which is likely to prejudice the investigation.

In short, although the 1990 Act and the 1993 Act were ostensibly intended to implement the 1988 UN Drugs Convention and certain aspects of the Directive, respectively, every money laundering offence created by these two Acts was in some way wider than the obligation under international or EC law would have required. The international and supra-national instruments certainly provided the opportunity for legislation and indeed made some legislation necessary; but it would be entirely incorrect to assume that the UK confined itself to the minimum so required. It looks very much more as though the UK saw the Directive in particular as a golden opportunity to introduce far reaching legislation.

There is a further respect in which the UK plainly used the Directive as an opportunity to extend the law. Sections 29 to 32 of the Criminal Justice Act 1993 made insertions in the 1988 Act creating money laundering offences as regards non-drug predicate offences. Except in two respects, these put the law as regards the laundering of such proceeds onto exactly the same footing as the law relating to the laundering of drug trafficking proceeds. The exceptions were that no offence of failing to report suspicion was created as regards non-drug predicate offences and that the tipping off offence (which became section 93D of the 1988 Act) had no equivalent to the very wide ambit of section 42 of the 1987 Act. With these exceptions, however, these provisions used the very wording of their drug trafficking equivalents, the only changes being those necessitated by the need to refer to "criminal conduct" rather than "drug trafficking". The Directive applied only to drug trafficking and did not, therefore, oblige the UK to apply any of its requirements to the laundering of the proceeds of non-drug predicate offences.

The writer has analysed the meaning and effect of the Money Laundering

⁹⁹³ Proceeds of Crime (Scotland) Act 1995 s49(2).

Regulations elsewhere⁹⁹⁴ and repetition here is unnecessary. In large measure they do indeed implement the Directive and the differences between the Regulations and the Directive are substantially matters of drafting style. It is, however, worth devoting a few paragraphs to the scope of the application of the Regulations because the approach which was taken provides a further example of the UK going beyond the minimum necessary for implementation.

Articles 3, 4, 10 and 11 of the Directive all make requirements in relation to "credit and financial institutions". In this they pick up the justification for the Directive asserted in its preamble, which is that "when credit and financial institutions are used to launder proceeds...the soundness and stability of the institution concerned and confidence in the financial system as a whole could be seriously jeopardised". "Credit institution" is defined in Article 1 of the Directive by reference to the first Banking Co-ordination Directive⁹⁹⁵. "Financial institution" is defined by reference to the Second Banking Co-ordination Directive⁹⁹⁶ and the first Life Directive⁹⁹⁷.

Had the UK sought to achieve only the minimum implementation required by the Directive the scope of the Regulations could have been defined by reference to the Directive definitions of "credit institution" and "financial institution". As the Treasury Consultation makes clear, however, the UK was going well beyond that minimum.

Article 12 of the Directive requires member States to "ensure that the provisions of this Directive are extended in whole or in part to professions and to categories of undertakings, other than the credit and financial institutions referred to in Article 1, which engage in activities which are particularly likely to be used for money laundering purposes". Article 15 permits Member States to "adopt or retain in force stricter provisions in the field covered by the Directive to prevent money laundering". The Consultation identified as factors of importance in

⁹⁹⁴ *Proceeds of Crime*...183-201.

⁹⁹⁵ 77/780/EEC.

⁹⁹⁶ 89/646/EEC.

⁹⁹⁷ 79/267/EEC.

determining whether a profession or undertaking was likely to be used for money laundering purposes, first, the nature of the activities engaged in, secondly, the extent to which client money is handled and, thirdly, the role of the profession in acting as an intermediary in the "formal" financial sector. On the basis of these facts it was thought that accountants, auctioneers, casinos, commodity and commodity futures brokers and dealers, solicitors, licensed conveyancers and authorised practitioners all posed a particular risk⁹⁹⁸. That assessment has since received some confirmation in the *FATF-VII Report on Money Laundering Typologies*⁹⁹⁹, which noted "an increase in the number of solicitors, attorneys, accountants, financial advisors, notaries and other fiduciaries whose services are employed to assist in the disposal of criminal profits"¹⁰⁰⁰. A similar trend was noted in the 1998 Typologies Report¹⁰⁰¹.

The Regulations proceed under reference neither to credit and financial institutions nor even to such institutions supplemented by a list of other professions and categories of undertaking. Instead, the scope of application of the Regulations is determined according to the nature of the business transacted. The focus is on the activity rather than on the person (natural or juridical) carrying out that activity. The Regulations apply to "relevant financial business" which is defined by reference to a list of types of business activity¹⁰⁰². Out of 9 rather broadly stated types of activity on that list, all but one¹⁰⁰³ of the first 7 are defined under reference to UK legislation¹⁰⁰⁴. The UK legislation referred to by the fifth of these seven is subordinate legislation which itself implemented a Directive¹⁰⁰⁵. Only the eighth and ninth types of business listed are defined under direct

⁹⁹⁸ Para 40.

⁹⁹⁹ *Financial Action Task Force on Money Laundering Annual Report 1996-1997*, Annex 3.

¹⁰⁰⁰ *Ibid* para 20.

¹⁰⁰¹ *Financial Action Task Force on Money Laundering: Money Laundering Typologies 1998*, para 43.

¹⁰⁰² Reg 4.

¹⁰⁰³ The business of the National Savings Bank.

¹⁰⁰⁴ Reg 4(1), (3) and (4).

¹⁰⁰⁵ The Second Banking Co-ordination Directive.

reference to EC instruments¹⁰⁰⁶.

This approach, taken when there was no reason in principle not to refer directly to relevant EC legislation, indicates a preference for working as far as possible within a municipal law frame of reference. It is also clear once again that the UK was using its obligations under a non-municipal instrument as an opportunity to apply control as widely as possible.

The 1994 model bilateral agreement

In 1994 the UK developed a *Model Agreement Concerning Restraint and Confiscation of the Proceeds and Instruments of Crime*¹⁰⁰⁷. The model is expressed to be without prejudice to obligations between the parties arising from other treaties¹⁰⁰⁸ of which the 1988 UN Drugs Convention and the Laundering Convention are the most obvious examples. Like the Model Agreement to supplement the Laundering Convention, much of the 1994 Model seeks to ensure that a request made to the UK contains the information necessary to give it practical effect. So, for example, Article 9, which deals with restraint requires that a request should include information about the commencement or intended commencement of proceedings. The 2 models are different, however, in that in the 1994 Model it has been thought necessary to set out information about the content of requests to a level of detail which is not necessary in the Model to supplement the Laundering Convention. There is no special significance in this; it simply reflects the fact that the Laundering Convention itself provides most of the detail necessary on these matters.

The Scottish Law Commission Report and the 1995 Act

The Proceeds of Crime (Scotland) Act 1995 consolidated the 1987 Act and the proceeds of crime provisions of the Criminal Justice (Scotland) Act 1995. The latter Act was a pre-consolidation measure which was only in force on one day¹⁰⁰⁹,

¹⁰⁰⁶ The Second Banking Co-ordination Directive and the First Life Directive.

¹⁰⁰⁷ Reproduced in Gilmore, *Mutual Assistance in Criminal and Business Regulatory matters*, 248.

¹⁰⁰⁸ Article 1(2).

¹⁰⁰⁹ Sunday 31 March 1996.

after which it was replaced by the Proceeds of Crime (Scotland) Act (which we shall continue to call "the 1995 Act"). The exercise gave effect to the Scottish Law Commission *Report on Confiscation and Forfeiture*¹⁰¹⁰ ("the SLC Report").

The background to the Report was a reference from the Secretary of State for Scotland under the Law Commissions Act 1965, requiring the Scottish Law Commission ("the SLC") to consider the adequacy of the law on the forfeiture of the instrumentalities and proceeds of "criminal activity in general" and "whether further provision should be made to enable courts in Scotland to order forfeiture of the proceeds of criminal activity generally and property derived from such proceeds"¹⁰¹¹. That reference was made in October 1987 and matters proceeded very slowly. A Discussion Paper was issued in 1989¹⁰¹² but it was 1994 before the SLC reported. In the intervening years, of course, proceeds of crime law had developed significantly. Of particular significance was the fact that the Laundering Convention had been concluded and ratified by the UK.

The SLC, in completing its Report, was aware of the international dimension to proceeds of crime law and of the need to take account of the obligations which the Laundering Convention "imposes" on its Parties¹⁰¹³. In its introductory pages the Report noted that criminal law policy must include an international element and that domestic legislators could no longer treat crime merely as a national phenomenon. It referred to both the 1988 UN Drugs Convention and the Laundering Convention¹⁰¹⁴. The UK's reservation on ratifying the latter, restricting its application in Scotland to drug trafficking offences was noted¹⁰¹⁵. The SLC observed in particular that Article 2 paragraph 1 of the Laundering Convention required each Party to "adopt such legislative and other measures as may be necessary to enable it to confiscate instrumentalities and proceeds or property the value of which corresponds to such proceeds" and took

¹⁰¹⁰ Scot Law Com No 147, 1994.

¹⁰¹¹ SLC Report para 1.1.

¹⁰¹² Scottish Law Commission Discussion Paper No 82, *Forfeiture and Confiscation*, 1989.

¹⁰¹³ SLC Report para 1.2.

¹⁰¹⁴ SLC Report para 2.8.

¹⁰¹⁵ SLC Report para 2.10.

note of the Convention definitions of "proceeds", "property" and "confiscation"¹⁰¹⁶. The international context, and the Laundering Convention in particular, was very much in the Commission's mind in the formulation of its recommendations¹⁰¹⁷ and it may therefore be said that the SLC Report's ultimate fruit, the Proceeds of Crime (Scotland) Act 1995, is influenced by conventional international law even though that influence is not immediately apparent from the text. It is clear that any approach which would have been acceptable within a purely municipal frame of reference would nevertheless have been rejected by the SLC if it had been incompatible with the Laundering Convention.

Examination of the Report discloses that the international law influence went rather further than merely establishing a framework within which the legislation was required to fit. In some aspects it made a positive contribution to the course recommended by the SLC. Addressing the fundamental question of when confiscation should be competent, the SLC noted Gilmore's remark that the Laundering Convention "contains an implicit invitation for such legislation to be as broad in scope as possible"¹⁰¹⁸ and on that ground justified a significantly wider scope for confiscation in Scotland than existed in England and Wales under the 1988 Act. In defining the key concepts of "benefit" from crime and "property", the SLC proceeded under explicit reference to the definitions in the Laundering Convention¹⁰¹⁹. The inclusion of a restraint order mechanism was justified not primarily under reference to the precedents in DTOA and the 1987 Act (though these were mentioned) but by the requirements of Article 3 of the Laundering Convention. Protocol 1 ECHR and the decision of the Human Rights Court in *Raimondo v Italy* were considered along with Article 5 of the Laundering

¹⁰¹⁶ SLC Report para 2.9.

¹⁰¹⁷ In the interests of complete accuracy it is recorded here that the writer was seconded part time to the SLC to assist with its work on confiscation and that the SLC was not aware of the international dimension until the writer drew it to the attention of the responsible Commissioner, Sheriff ID MacPhail QC. It must be emphasised that he was immediately receptive and that, having been referred to the basic texts, he went on to research the matter himself. The particular references to international law in the Report are attributable to him and not to the writer.

¹⁰¹⁸ SLC Report para 3.2, citing WC Gilmore, *International Efforts to Combat Money Laundering*, xv.

Convention and its associated *Explanatory Report* in the formulation of proposals for the protection of third party interests in property liable to be realised to satisfy a confiscation order¹⁰²⁰. Similar references characterise the SLC's consideration of the forfeiture of instrumentalities of crime¹⁰²¹. A chapter is devoted to international co-operation and it proceeds within the framework of the requirements of Articles 7 and 11 of the Laundering Convention¹⁰²².

What the SLC effectively did was to check the existing confiscation law as regards drug trafficking against the requirements of the Laundering Convention and ECHR and to formulate recommendations for a confiscation regime applying to other types of predicate offence under conscious reference to the requirements of those two instruments. The Report included a draft Bill, which was enacted with no alteration of any significance for our present purpose. The law is now very much in the form which the SLC recommended. It may therefore be said that confiscation law in Scotland has been deliberately put into a form in which it is consistent with the relevant international instruments and that this has involved some departure from the English law model.

It would be wrong to make too much of this. For one thing, such an approach was essential if the reservation which severely limited the effect of the Laundering Convention as regards Scotland was to be withdrawn. For another, it was the SLC and not the Government which made such a point of securing compliance with the Convention¹⁰²³. And, finally, the steps necessary to comply with the Convention were relatively minor and certainly did not involve any major policy changes. Even without the Laundering Convention, Scottish confiscation law would have looked very much as it does now. The references to international law tended to confirm and support the approach to which the SLC was in any event inclined and to provide a useful peg upon which to hang

¹⁰¹⁹ SLC Report para 4.3.

¹⁰²⁰ SLC Report para 10.1.

¹⁰²¹ SLC Report paras 11.1, 12.6, 12.20, 16.2.

¹⁰²² SLC Report paras 18.1-18.19.

¹⁰²³ It should be recorded, however, that the Scottish Office official with responsibility for proceeds of crime issues was anxious to be able to have the declaration withdrawn.

recommendations rather than to demand an approach which the SLC would not otherwise have chosen. In a wider UK framework, that, as we have seen, is exactly what happened as regards money laundering law and the EC Directive.

The writer has analysed the content of the 1995 Act in great detail in the *Current Law Statutes Annotated* series and it is not necessary to repeat that analysis here. The effect was very much to apply the scheme of the 1987 Act to all types of predicate offence.

What does require some consideration, however, is why it should be that there have been very few prosecutions for money laundering and why confiscation orders should have accounted for only very small amounts of money by comparison with the large estimates of the value of the drugs trade internationally. The Second Commission Report to the European Parliament and the Council on the implementation of the Money Laundering Directive notes that "It does not appear that large amounts are being confiscated and there are indications, from certain Member States, that much of the money seized or frozen ultimately has to be returned or released"¹⁰²⁴. The Home Office Working Group on Confiscation has noted that "Whilst the United Kingdom's criminal confiscation scheme has had some effect in depriving criminals of their assets, it has not been as successful as originally anticipated...[the amount confiscated] represents only a tiny proportion of the sums by which criminals are benefiting from crime"¹⁰²⁵.

The Fraud and Specialist Services Unit at Crown Office no longer maintains a record of confiscation orders made and has never maintained a record of money laundering prosecutions. Such orders and prosecutions are not separately identified for Scotland; indeed, the Home Office publication *Drug Seizure and Offender Statistics, United Kingdom, 1997*, although it addresses the whole of the UK in most of its statistics, restricts information about confiscation

¹⁰²⁴XV/1116/97-rev.2, 21.

¹⁰²⁵Home Office Working Group on Confiscation, Third Report, *Criminal Assets*, November 1998, paras 4.2 and 4.2.

orders to England and Wales alone¹⁰²⁶. Confiscation orders are not mentioned at all in the Scottish Office publication *Costs, Sentencing Profiles and the Scottish Criminal Justice System, 1997*¹⁰²⁷. Some limited statistics are given for confiscation orders in Crown Office Annual Reports as follows¹⁰²⁸:

Year	Amount Confiscated
1991/2	Over £90,000"
1992/3	£28,440
1993/4	"In excess of £260,000"
1994/5	"In excess of £50,000"
1995/6	"In excess of £260,000"
1996/7	"In excess of "£455,000"
1997/8	In excess of £390,000"

By way of comparison, the English figures were as follows¹⁰²⁹:

Year	Number	Amount (£m)
1987	203	1.2
1988	539	8.1
1989	802	7.9
1990	871	10.1
1991	1005	5.5
1992	1002	9.1
1993	983	9.7
1994	1248	25.4
1995	1562	18.4
1996	1557	10.5
1997	1466	5.6

Separate figures for non-drug confiscations in Scotland are not published or collated but it is understood that between April 1998 and April 1999 5 such cases were dealt with and confiscation orders made to a total of £279,442¹⁰³⁰. For England and Wales, the Home Office Working Group on Confiscation has said that "between April 1989 and December 1996, £14.9 million was ordered to be

¹⁰²⁶ John Martin Corkery, *Drug Seizure and Offender Statistics, United Kingdom, 1997*, Home Office Statistical Bulletin, Issue 8/99, 29 April 1999, para 68.

¹⁰²⁷ Published 30 March 1999.

¹⁰²⁸ Numbers of cases are not given except for 1994/5 when there were 2 orders, 1995/6 when there were 9, 1996/7 when there were 6 and 1998/9 when there were 10.

¹⁰²⁹ John Martin Corkery, *op cit*, 31.

confiscated from criminals convicted of offences to which Part VI of the Criminal Justice Act 1988 applies. Appeals resulted in downward variations totalling £630,000 while approximately £1.5 million was written off following the serving of default sentences. This left a revised total of approximately £12.7 million available for confiscation of which £4.5 million was remitted to the Consolidated Fund indicating a recovery rate of approximately 37%”¹⁰³¹. A little later, the Working Group noted that “the number of convicted drug traffickers liable to a confiscation order rose from about 3,000 in each of the years 1987 to 1991 to over 7,000 in 1996. The number of confiscation orders actually made first exceeded 1,000 in 1991, rising to a little over 1,500 in 1996. In the same period, the total amount ordered to be confiscated rose from just over £1 million in 1987 to over £10 million in 1996. Between 1987 and 1996 only 157 drug trafficking confiscation orders for £100,000 or more were made against a background of over 45,000 convictions for supply of drugs. It may be inferred from the statistics that large numbers of persons are convicted who have insufficient assets to justify a confiscation order being made, whilst relatively few confiscation orders are being made against major criminals with substantial assets. Furthermore, whilst the amounts ordered by the courts to be confiscated have risen, those actually realised have remained consistently low at about £5 million per annum in relation to the proceeds of drug trafficking, and less where the proceeds of all other serious crimes are concerned”¹⁰³².

Levi has examined this issue from a criminology perspective, including comparative material from non-UK jurisdictions¹⁰³³. Some of his conclusions are rather subjective, involving comment on the lack of organisational incentive for law enforcement officers and prosecutors to invest effort in confiscation work and on a perceived lack of expertise on the part of counsel and judges. He may be

¹⁰³⁰ Conversation with Ms C Duncan, Fraud and Specialist Services Unit, Crown Office, 8th June 1999.

¹⁰³¹ *Op cit* para 2.4.

¹⁰³² *Op cit* paras 4.2-4.3.

¹⁰³³ Michael Levi, “Taking the Profit Out of Crime: The UK Experience” 5 *European Journal of Crime, Criminal Law and Criminal Justice* 228, 237 (1997).

right but assessing the accuracy and significance of propositions such as these is difficult. Two other explanations which he offers do, however, clearly hold water. The first of these is that “relatively few ‘Mr Bigs’ have been convicted in the courts” and so few of the most major figures in the drugs business (in whose hands one might expect the biggest profits to be concentrated) have suffered confiscation. This accords well with evidence given by the Crown Office to the Scottish Affairs Committee in 1993, when it was said that “the hidden profits of drug trafficking in Scotland in relation to the identified accused persons is considerably lower than in England and Wales...the pattern to date in Scotland in importation cases has tended to be the persons who are arrested are perhaps lowly seamen or paid couriers rather than the people behind the organisation”¹⁰³⁴.

The second of Levi’s points is that persistent offenders at a medium or low level tend to have “spend as they go” lifestyles with low savings ratios, so that there is little available for confiscation. It is certainly the case that Crown Office scrutiny of the financial position of offenders with a view to confiscation proceedings tends to discover that the benefit which they can be shown to have derived from crime is higher (sometimes significantly higher) than their realisable property. In *HM Advocate v McLean*¹⁰³⁵, for example, in which the Opinion of Lord Sutherland sets out the financial position of the offender in detail, the benefit from crime was £146,064 but the value of the realisable property was only £98,966.

As regards the prosecution of money laundering offences, the European Commission has explained, so far as the UK is concerned, that “between 1993 and 1996 there were 25 convictions for money laundering, of which 13 [were] in 1996. Although only 1 prosecution for money laundering resulted from a suspicious transaction report there were over 200 known prosecutions for other offences in 1996 as a result of reports passed on to police or investigative

¹⁰³⁴ Scottish Affairs Committee, First Report, Session 1993-94, *Drug Abuse in Scotland*, HC Paper 62, Vol III, 162 (evidence of Mr N McFadyen).

¹⁰³⁵ 1993 SCCR 917.

authorities”¹⁰³⁶.

In *Kerr v HM Advocate*¹⁰³⁷ Lord Hunter said¹⁰³⁸ that section 4(3)(b) of the Misuse of Drugs Act 1971 “was purposely enacted in the widest terms and was intended to cover a great variety of activities both at the centre and also on the fringes of dealing in controlled drugs. It would, for example, in appropriate circumstances include the activities of *financiers*, couriers, and other go-betweens, lookouts, advertisers, agents and many links in the chain of distribution”. Earlier in his Opinion, he doubted whether the offence could be regarded simply as a form of statutory concert. Lord Hunter’s analysis was approved by the Lord Justice-Clerk (Ross) in *Kyle v HM Advocate*¹⁰³⁹. For English law, *R v Blake and O’Connor*¹⁰⁴⁰ confirms that the offence may be committed by a person who is at some distance from the making of an offer to supply, provided that there is some identifiable participation in the process¹⁰⁴¹. With these cases, we should read *Nelson v HM Advocate*¹⁰⁴², in which it was held (subject to the requirement for fair notice) that the Crown could lead evidence of a crime not charged where that crime was relevant to the proof of the crime which was charged.

When we examine the content of the several money laundering offences in light of these authorities, it becomes clear that section 4(3)(b) of the 1971 Act is in fact apt to cover much of what is dealt with in the money laundering legislation (other than the Regulations).

Section 14(1) of the 1990 Act strikes at the drug trafficker who, in order to avoid prosecution or confiscation, conceals or disguises property representing the proceeds of drug trafficking. The property concerned need not itself be entirely, or even substantially, the proceeds of drug trafficking; nor does it require to be the actual proceeds. It is enough if part of the property concerned represents those

¹⁰³⁶*Op cit* Annex 9.

¹⁰³⁷ 1986 SCCR 81

¹⁰³⁸ At 87.

¹⁰³⁹ 1988 SLT 601, 603.

¹⁰⁴⁰ (1979) 68 Cr App R 1, CA.

¹⁰⁴¹ *R v Farr* [1982] Crim LR 745 CA; cf *R v Hughes* (1985) 81 Cr App R 344 CA per Gore LJ.

¹⁰⁴² 1994 SCCR 192

proceeds even indirectly¹⁰⁴³. This offence is plainly ancillary to the drug trafficking itself. In order to prove it, the Crown would require to prove that the accused had proceeds of drug trafficking. The evidence to prove that, combined with evidence of the kind of dealings with money which would be within the ambit of section 14(1), would be likely to be apt to prove the predicate offence. There is little point in a prosecutor trying to prove money laundering when he can prove drug trafficking. Similarly, the person who knows that property is in whole or in part the proceeds of drug trafficking and has dealings with it so as to bring himself within section 14(2) is very likely also to bring himself within section 4(3)(b) of the 1971 Act as explained in *Kerr*. Subject to a possible exception in the case of the single-transaction drug trafficking case, in which the crime is complete before anything is done with the property, the evidence of the dealings with property is evidence which might well be apt to prove involvement in continuing drug trafficking itself. Indeed, in *R v McMaster*¹⁰⁴⁴ it was held that the offence (now consolidated for England and Wales as section 50(1) of the Drug Trafficking Act 1994) is apt to cover the conversion of sterling to Dutch guilders in order to buy drugs (and not merely to hide the proceeds). The scope left to section 14(2) alone is thus reduced to the situation in which the person who deals with property only has reasonable grounds to suspect the provenance of the property.

Section 37 of the (Consolidation) Act makes a person guilty of an offence if, knowing that any property is, or in whole or in part directly or indirectly represents another person's proceeds of drug trafficking, he acquires or uses that property or has possession of it¹⁰⁴⁵. Again leaving aside the case where drug trafficking has ceased before the accused becomes involved with the property, the person who acts in a way which is liable to be struck at by section 37 is also liable

¹⁰⁴³For more detailed analysis, see Alastair N Brown, *Proceeds of Crime: Money Laundering*...144.

¹⁰⁴⁴1998 TLR 659.

¹⁰⁴⁵For more detailed analysis, see Alastair N Brown, *Proceeds of Crime: Money Laundering*...154.

to be convicted under section 4(3)(b) of the 1971 Act.

Similarly, section 38 of the (Consolidation) Act makes a person is guilty of an offence if, knowing or suspecting that another person is involved in drug trafficking, he is concerned in an arrangement whereby the retention or control of the proceeds of drug trafficking is facilitated. This offence is not capable of being committed by a person in relation to his own proceeds of drug trafficking, though it is possible to figure a case in which one member of a trafficking group assists another member to retain that other member's proceeds and thus commits this offence. In general, however, the offence is aimed at those who have not participated in the actual trafficking but who assist in retention. The precondition is that the accused knows or suspects that the other person is one who carries on, or has carried on, or has derived financial or other rewards from, drug trafficking. It is to be noted that the knowledge or suspicion relates to activities, not to the particular funds¹⁰⁴⁶. Again, in the case of the person who can be proved to have *known* the provenance of the property, proof that a person assisted in the retention of the proceeds of the crime is very likely to bring that person equally within section 4(3)(b) of the 1971 Act. Prosecutors will usually prefer to proceed for the well-understood section 4(3)(b) offence, which is, after all, the primary offence. Money laundering offences are, by definition, derivative. Once again, the money laundering offence is likely to be the charge of choice only in the case of the accused who can only be proved to have *suspected* the provenance of the property.

The first explanation for the infrequency with which money laundering is prosecuted, therefore, is that there is a good chance that many money laundering offences are simply subsumed within charges under section 4(3)(b) of the 1971 Act. Indeed, they may be subsumed in other charges as well. In *R v Benn*¹⁰⁴⁷, evidence of money laundering was part of the proof of conspiracy to evade the prohibition on the importation of class A drugs. To put it another way, UK law

¹⁰⁴⁶For more detailed analysis, see Alastair N Brown, *Proceeds of Crime: Money Laundering*...156.

was already, as a result of existing law, and in particular the 1971 Act, in a position to penalise money laundering and hence consistent with much of what was required by the 1988 UN Drugs Convention, the Laundering Convention and the Directive.

Secondly, it might well be that the infrequency with which money laundering is prosecuted is a further reflection of the factors which have caused the confiscation figures to be lower than might have been expected. If McFadyen was right to suggest that few of the promoters of drug trafficking are caught in Scotland and if Levi is right to explain the low figures in terms of the hedonistic lifestyle of criminals, it would follow that the proceeds of much drug trafficking in Scotland would be running at a sufficiently low level not to require laundering and that those making such proceeds are less concerned with laundering them than with spending them on consumable goods. This does not make the legislation unnecessary. It is well recognised that laundering activity moves away from jurisdictions with strong anti-money laundering legislation towards jurisdictions with a weaker legislative framework¹⁰⁴⁸ and the having of the legislation in place must have some deterrent effect.

Finally, it should be noted, that in order to prove all of the offences discussed above, the Crown has to prove that the property concerned is or represents the proceeds of drug trafficking in particular, rather than of crime in general. In the confiscation context, the link between proceeds and drug trafficking is made using the statutory assumptions. As Lord Sutherland put it in *McLean*, "the general approach taken by the Crown is set out in Schedule 1. The first section calculates the increase in net assets for each year. The second section calculates total withdrawals from building society and bank accounts with an adjustment for payments which have already been taken into account by reason of increasing assets or reducing liabilities. The sum of net increase in assets and withdrawals constitutes known expenditure. From this is deducted for each year

¹⁰⁴⁷ Unreported, Court of Appeal, 10 December 1998 (transcript on file with author).

the total known income. The balance constitutes expenditure which cannot be explained by known legitimate transactions and, *using the assumption contained in section 3(2) [of the 1987 Act], is deemed to be the proceeds of drug trafficking*¹⁰⁴⁹. No such assumptions are available in relation to the money laundering offences and the fact that the property was the proceeds of drug trafficking in particular would require full proof to the criminal standard. That is a task which would not be easy to accomplish, especially where active steps had been taken to conceal the existence or provenance of the property.

Somewhat similar points may be made about non-drug money laundering. Section 93C of the Criminal Justice Act 1988 ("the 1988 Act") creates non drug laundering offences equivalent to those in section 14 of the 1990 Act. Sections 93A and 93 B of the 1988 Act create offences of assisting another to retain the benefit of criminal conduct and of acquisition, possession or use of the proceeds of criminal conduct, equivalent to sections 38 and 37 of the (Consolidation) Act respectively. In the case of a continuing, organised, criminal scheme, the evidence which would be necessary to prove these offences would (especially because the Crown would require to prove the predicate offence to prove the money laundering) be very likely to be sufficient to convict the accused of the predicate offence on the basis of accession. Lord Patrick's explanation of accession in *HM Advocate v Lappen and Others*¹⁰⁵⁰ (a robbery case) seems to make the point clear: "if a number of men form a common plan whereby some are to commit the actual seizure of the property, and some according to the plan are to keep watch, and some according to the plan are to help to carry away the loot, *and some according to the plan are to help to dispose of the loot*, then, although the actual robbery may only have been committed by one or two of them, everyone is guilty of the robbery..."¹⁰⁵¹.

¹⁰⁴⁸ See, for example, Financial Action Task Force on Money Laundering, *Annual Report 1996-1997*, para 18.

¹⁰⁴⁹ Emphasis added.

¹⁰⁵⁰ 1956 SLT 109, 110.

¹⁰⁵¹ Emphasis added.

The 1999 (Designated Countries and Territories) Order

The Confiscation of the Proceeds of Crime (Designated Countries and Territories) (Scotland) Order 1999¹⁰⁵² was made under the powers given by sections 40 and 43 of the 1995 Act. Section 40 provides for the enforcement of orders made outside the UK while section 43 provides for the taking of action in designated foreign countries. Put another way, section 40 deals with the giving of mutual legal assistance in connection with the confiscation of the proceeds of crime while section 43 deals with the obtaining of such assistance.

Section 40 provides that Order in Council may “direct in relation to a country or territory outside the United Kingdom designated by the Order that, subject to such modifications as may be specified”, Part I of the 1995 Act (which deals with confiscation) and Part III of the Act (which deals with restraint orders) “shall apply in relation to external confiscation orders and to proceedings which have been or are to be instituted in the designated country and may result in an external confiscation order being made there”¹⁰⁵³. “External confiscation order” is defined so as to mean “an order made by a court in a designated country for the purpose of recovering payments or other rewards or property or other economic advantage” received in connection with offences corresponding to those to which Part I of the Act applies—that is, those non-drug crimes for which confiscation is available in Scottish cases—or received in connection with drug trafficking¹⁰⁵⁴.

The UK ratified the Laundering Convention on 28 September 1992 with the reservation that, as regards Scotland, confiscation was only available in drug trafficking cases. Article 7(2) of that Convention provides that “each Party shall adopt such legislative or other measures as may be necessary to enable it to comply, under the conditions provided for in this chapter, with requests...(a) for confiscation of specific items of property representing proceeds or instrumentalities, as well as for confiscation of proceeds consisting in a requirement to pay a sum of money corresponding to the value of proceeds”. The

¹⁰⁵² *Supra.*

¹⁰⁵³ Section 40(1).

1995 Act came into force on 1 April 1996. It took until 1 May 1999 and the coming into force of the Order in Council for Scots law to be put in a position to meet the obligations which the UK had accepted under the Laundering Convention. It is understood that no request was received in the interim for assistance in the confiscation in Scotland of the proceeds of non-drug crime. This was probably fortuitous; or it may be that other States, aware of the reservation, simply did not ask. It is undeniable, however, that Scottish Office (the Department responsible for obtaining the Order in Council) plainly did not accord any significant priority to putting in place a means of meeting the international obligations which had been accepted in relation to proceeds of crime. It is easy to criticise the Home Office for ignoring Scots law in its international criminal justice policy; but if the Scottish Office does not pursue international criminal law issues with greater vigour than it demonstrated in relation to this Order in Council it is understandable that Home Office should concentrate its attentions elsewhere.

The 1998 Confiscation Order follows the same pattern as the Forfeiture Order. It operates by applying a modified version of parts I and III of the 1995 Act to orders made by courts in designated countries “for the purpose of recovering payments or other rewards or property or other economic advantage received in connection with offences corresponding with or similar to offences to which part I of the Act applies or drug trafficking”¹⁰⁵⁵.

The Order was made under powers granted by section 40 of the 1995 Act. It supersedes an Order made under the 1987 Act and its subsequent amendments to reflect the designation of new countries¹⁰⁵⁶ but restricted, as the 1987 Act was itself, to drug trafficking cases.

Schedule 3 to the 1998 Order rewrites the 1998 Act as necessary to apply it to “external confiscation orders”, an expression defined in the Act under

¹⁰⁵⁴ Section 40(2).

¹⁰⁵⁵ Explanatory Note.

¹⁰⁵⁶ Confiscation of the Proceeds of Drug Trafficking (Designated Countries and Territories) (Scotland) Order 1991 (SI 1991 No 1467 as amended by SI 1992 No 1733, 1993 No 1806 and 1993 No 3156).

reference to offences “corresponding with or similar to” offences to which part I of the 1995 Act applies or drug trafficking¹⁰⁵⁷.

Part I of the Act applies, by section 1(2), to offences prosecuted on indictment and to those offences prosecuted summarily, for which the available penalty exceeds the usual summary maxima. For restraint order purposes, it was held in *Carnegie v McKechnie*¹⁰⁵⁸ that section 1(2) is “unhappily worded” and that it was plain from a wider reading of the Act that Parliament intended that restraint orders might be pronounced immediately following the institution of proceedings against an individual, which might well occur at a time before there is any indictment. The Court adopted what it called a “strained” construction in order to give effect to this intention. Since the Order proceeds on the basis that assistance will be available when proceedings have been instituted in a designated country¹⁰⁵⁹, it may be that *Carnegie v McKechnie* is a timely decision, avoiding unlooked for complications about what in a given foreign state is equivalent to indicting in Scotland.

Article 18(4) of the Laundering Convention permits States parties to refuse co-operation if “under the law of the requested Party confiscation is not provided for in respect of the type of offence to which the request relates”. This, the Explanatory Report tells us¹⁰⁶⁰ “is meant to cover cases where confiscation is not at all provided for in respect of a certain offence by the requested Party”. The breadth of application of Part I of the 1995 Act seems likely to be such that Scots law will rarely have to refuse co-operation on this ground. Moreover, in *re JL*¹⁰⁶¹ Judge J held that the equivalent English Order was operative notwithstanding the fact that the proceedings in the foreign country were civil proceedings *in rem*. There seems to be no reason why a similar decision should not be reached if the point arose in Scotland.

¹⁰⁵⁷1995 Act s40(2).

¹⁰⁵⁸1999 GWD 7-319; full transcript on file with author.

¹⁰⁵⁹Schedule 3 para 14.

¹⁰⁶⁰Para 70.

¹⁰⁶¹The Times, 4 May 1994.

The detailed modifications made by the Order are technical and consequential to the need to make restraint and confiscation available to assist requesting States. They do not require analysis here.

The States which are designated for mutual assistance fall into 2 groups. The first group consists of those States which are Party to the 1988 UN Drugs Convention. They are designated only in relation to drug trafficking¹⁰⁶². The second group is designated in relation to all types of predicate offence¹⁰⁶³. It consists of a mixture of Commonwealth countries able to co-operate under the Harare Scheme as amended, Parties to the Laundering Convention and the 3 countries (Canada, Thailand and the USA) with which the UK has the general MLATs discussed above¹⁰⁶⁴.

Confiscation and Human Rights

ECtHR has been required to consider confiscation and forfeiture regimes in a number of cases and EComHR has recently dealt with another case in which the application of one of the ECtHR cases has been discussed and refined. These cases will be described shortly. In general, however, it is worth noting Reid's remark that "draconian powers for the seizure of goods in the customs or criminal context which pursue lawful and legitimate purposes have proved acceptable [to ECtHR], subject to minimum requirements of procedural safeguards"¹⁰⁶⁵. She cites *Handyside v United Kingdom*¹⁰⁶⁶, in which ECtHR held that States have an extremely wide margin of appreciation in relation to the necessity for interference with property rights in pursuit of the general interest (though she does point out that *Handyside* represented "an extreme approach" which has been mitigated by later cases¹⁰⁶⁷).

It is also worth noting that the SLC Report took some account of ECHR in

¹⁰⁶² Article 3 and Schedule I Part I.

¹⁰⁶³ Article 3 and Schedule I Part II.

¹⁰⁶⁴ Page 177.

¹⁰⁶⁵ Karen Reid, *A Practitioner's Guide to the European Convention on Human Rights*, 1998, 218.

¹⁰⁶⁶ (1979-80) 1 EHRR 737.

¹⁰⁶⁷ *Ibid*, n23.

relation to the protection of third-party interests in property liable to forfeiture or confiscation¹⁰⁶⁸. It noted briefly that Article 1 of the First Protocol, which protects the right to peaceful enjoyment of possessions, provides specifically that its protection of that right is not to impair in any way the right of a State to enforce such laws as it deems necessary, *inter alia*, to secure the payment of penalties. As we have noted, however, the SLC Report proceeded explicitly under reference to the Laundering Convention and, as a result, the 1995 Act is also consistent with the Laundering Convention. It is well recognised that ECtHR reasons not only in the light of ECHR itself but also in the light of general international law¹⁰⁶⁹ and in the light of the developing work of the Council of Europe¹⁰⁷⁰. It is therefore possible to proceed on the basis that, to the extent that the provisions of the 1995 Act reflect accurately the Laundering Convention and other multilateral treaties with wide participation, they would not be held to breach ECHR.

*Raimondo v Italy*¹⁰⁷¹ was the first case in which the Court considered confiscation other than under special Customs powers. In it, the applicant was prosecuted, and ultimately acquitted, on charges relating to his alleged membership of a mafia-type organisation. In connection with the prosecution, the Italian District Court had, on 13 May 1985, ordered “preventive seizure” of 10 plots of land, 6 buildings and 6 vehicles. On 16 October 1985, it ordered the confiscation of some of those assets on the ground that it had not been proved that they had been lawfully acquired. Following his acquittal on 30 January 1986, the Italian Court of Appeal on 4 July 1986 ordered the return of the confiscated

¹⁰⁶⁸ SLC Report para 10.1.

¹⁰⁶⁹ See in particular JG Merrills, *The development of international law by the European Court of Human Rights*, 2nd edition, 1993, chapter 19.

¹⁰⁷⁰ In *Burghartz v Switzerland* (1994) 18 EHRR 101, which concerned the right of married persons to choose the name by which they would be known, part of the Court’s reasoning in support of its conclusion that Article 8 had been breached was the fact that “the advancement of the equality of the sexes is today a major goal in the Member States of the Council of Europe”. Precisely the same consideration had been invoked by the Court in *Abdulaziz, Cabales and Balkandali v United Kingdom* (1985) 7 EHRR 471, an immigration case in which the point at issue was the disadvantageous position in which the husbands of female immigrants were placed compared with the wives of male immigrants.

¹⁰⁷¹ *Supra*.

property. There was, however, delay of over 4 years in the return of some of the property.

The applicant complained, *inter alia*, that the confiscation had breached Article 1 of Protocol 1 in itself and in that the property had not been adequately supervised and had suffered damage. ECtHR held that the seizure ordered on 13 May was "clearly a provisional measure intended to ensure that property which appears to be the fruit of unlawful activities carried out to the detriment of the community can subsequently be confiscated if necessary. The measure as such was therefore justified by the general interest and, in view of the extremely dangerous economic power of an 'organisation' like the Mafia, it cannot be said that taking it at this stage of the proceedings was disproportionate to the aim pursued...the confiscation...pursued an aim that was in the general interest, namely it sought to ensure that the use of the property in question did not procure for the applicant, or the criminal organisation to which he was suspected of belonging, advantages to the detriment of the community...The Court is fully aware of the difficulties encountered by the Italian State in the fight against the Mafia. As a result of its unlawful activities, in particular drug trafficking, and its international connections, this 'organisation' has an enormous turnover that is subsequently invested, *inter alia*, in the real property sector. Confiscation, which is designed to block these movements of suspect capital, is an effective and necessary weapon in the combat against this cancer. It therefore appears proportionate to the aim pursued...the preventive effect of confiscation justifies its immediate application notwithstanding any appeal". With regard to the confiscation, the state did not overstep its margin of appreciation. As to damage, that is an inevitable consequence of any seizure or confiscation. It was not clear that the damage sustained exceeded that which was inevitable. However, the Court found it hard to see why there had been such a long delay in returning property to the applicant. That delay was neither provided for by law nor necessary and in that respect there was a breach of Article 1 of Protocol 1.

This approach would tend to confirm that ECtHR would not regard a

Scottish Restraint Order as being in any way in breach of ECHR, not least because there is a facility in such orders for the appointment of an administrator to property which requires active management to preserve its value. This would place the owner of property affected by a Scottish Restraint Order in a rather better position than was Mr Raimondo. Moreover, and at the most general level, it seems possible to derive two broad propositions from the *Raimondo* case. The first is that in cases where serious organised crime is alleged, confiscation arrangements and interim measures designed to facilitate such arrangements, will not breach ECHR even where there is damage to the property concerned and the accused is ultimately acquitted. The second is that the robust attitude which the Court takes to action against serious crime does not extend to overlooking maladministration.

In *Welch v United Kingdom*¹⁰⁷², the applicant had been arrested and charged in November 1986 in relation to drug trafficking offences. In January 1987 DTOA came into force, making it possible for the first time for English courts to impose confiscation orders. In February and May 1987 the applicant was charged with further drug trafficking offences. In August 1988 he was convicted of five counts. He was imprisoned and a confiscation order was imposed in the sum of £66,914 (subsequently reduced on appeal to £59,914). He complained under Article 7 that the imposition of a confiscation order constituted a retroactive criminal penalty.

The Government argued that the true purposes of a confiscation order were two-fold: firstly, to deprive a person of the profits which he had received from drug trafficking and secondly, to remove the value of the proceeds from future use in the drugs trade. On this basis, the Government argued, confiscation was not a penalty.

ECtHR held, however, that the concept of a penalty in Article 7 is an autonomous Convention concept. The wording of Article 7(1) indicates that the starting point for the assessment of the existence of a penalty is whether the

measure is imposed following conviction for a criminal offence. Other factors that may be taken into account are the nature and purpose of the measure in question, its characterisation under national law, the procedures involved in the making and implementation of the measure and its severity.

Before a confiscation order can be made in English law, the accused must have been convicted of a drug trafficking offence. This link is not diminished by the fact that, due to the operation of the statutory presumptions concerning the extent to which the accused has benefited from drug trafficking, the court order may affect proceeds which are not directly related to the facts underlying the criminal conviction. The 1986 Act was introduced to overcome the inadequacy of existing powers of forfeiture. Although the provisions were designed to ensure that proceeds were not available for use in future drug trafficking and that crime does not pay, the legislation also pursues the aim of punishing the offender. The aims of prevention and reparation are consistent with a punitive purpose and may be seen as constituent elements of the very notion of punishment.

The Court considered that several aspects of the making of an order under the 1986 Act were in keeping with the idea of a penalty even though they were essential to the preventive scheme inherent in the 1986 Act. These included the sweeping statutory assumptions that all property passing through the offender's hands during a six-year period is the fruit of drug trafficking unless he can prove otherwise, the fact that the confiscation order is directed to proceeds and not restricted to actual enrichment or profit, the discretion of the trial judge in fixing the order to take account of the degree of culpability of the accused and the possibility of imprisonment in default of payment. These elements, considered together, provide a strong indication of *inter alia* a regime of punishment.

Looking behind appearances at the reality of the situation, whatever the characterisation of the measure of confiscation, ECtHR said that the fact remained that the applicant faced more far reaching detriment as a result of the order than that to which he was exposed at the time of the commission of the offences of

¹⁰⁷² (1995) 20 EHRR 247.

which he was convicted. There was therefore a breach of Article 7; but the Court stressed that its conclusion related only to the retrospective application of the legislation and did not call into question in any respect the powers of confiscation conferred on the courts as a weapon in the fight against “the scourge of drug trafficking”. It should be added that the fact that confiscation is a penalty does not necessarily mean that a confiscation hearing is the determination of a criminal charge so as to bring Article 6 into play. It is possible that it is the determination of a question of civil right-though that is undecided-but it is suggested that the detailed arrangements for confiscation hearings, which include the giving to the accused of substantial notice of the Crown case, would satisfy Article 6 in any event.

In *Taylor v United Kingdom*¹⁰⁷³, EComHR considered the effect of *Welch*. In 1986 the applicant had pleaded guilty to drug trafficking between January 1974 and September 1979. He was imprisoned and fined £234,750. In January 1987 DTOA came into force. In November 1994 the applicant was convicted of drug trafficking between February 1990 and April 1993. He was imprisoned and a confiscation order was made for an amount in excess of £15 million in relation to proceeds from drug trafficking between 1974 and 1979 and between 1990 and 1993. He contended that the confiscation order breached Article 7 to the extent that it related to proceeds from drug trafficking between 1974 and 1979. His appeal was unsuccessful because the Court of Appeal held that at the time he committed the offence between 1990 and 1993 (which had triggered the Confiscation order) he was aware of the possibility of a confiscation order because DTOA had come into force.

EComHR took a slightly different approach. They followed *Welch* in holding that confiscation is a penalty for the purposes of Article 7 ECHR but noted that the application of confiscation to proceeds relating to the earlier offences was based on the fact that the applicant had “benefited” from drug trafficking at that time rather than upon his conviction of it. It was not his earlier

conviction upon which the Crown Court had relied in making that part of the order which related to proceeds before DTOA came into force but rather his admission that he had derived benefit. The confiscation order was therefore not a penalty for the period between 1974 and 1979 but only for the period between 1990 and 1993.

Whilst *Welch* and *Taylor* are of assistance in understanding the nature of UK confiscation orders in terms of ECHR, they would on their facts apply only to a very limited range of cases. They will only be directly relevant where, in a drugs case, proceeds obtained before the 1987 Act came into force are in issue. In other kinds of crime, it would be proceeds obtained before the 1995 Act came into force on 1 April 1996 to which these cases would have relevance. Every significant aspect of the 1995 Act regime may be related to the Laundering Convention and, in drugs cases, to the 1988 UN Drugs Convention. In particular, both of those Conventions require that banking confidentiality (which might otherwise be an issue) is not to be allowed to impede investigations¹⁰⁷⁴. In *Elton v United Kingdom*¹⁰⁷⁵ it was argued for the applicant that the making of a confiscation order against him (by an English Court, under DTOA) breached Article 6(2) ECHR in that it was based on an assumption rather than on proof beyond reasonable doubt. We leave aside the fact that this proposition depended in part on the fallacy that ECHR prescribes any particular standard of proof. EComHR noted ECtHR's remark in *Welch* that "it does not call into question in any respect the powers of confiscation conferred on the courts as a weapon in the fight against the scourge of drug trafficking"¹⁰⁷⁶ and went on to deal with the matter on the basis of the ordinary ECHR jurisprudence about presumptions¹⁰⁷⁷, in terms of which the critical question is the rebuttability of the presumption in question. The application was held to be manifestly ill-founded, and hence inadmissible, on the

¹⁰⁷³ Application No 31209/96; [1998] EHRLR 90.

¹⁰⁷⁴ Laundering Convention Art 4; 1988 Convention Art 5(3).

¹⁰⁷⁵ Application No 32344/96, 11 September 1997.

¹⁰⁷⁶ Court, para 36.

¹⁰⁷⁷ Especially *Salabiaku v France* (1993) 13 EHRR 379 and *Pham Hoang v France* (1996) 16 EHRR 53.

basis that the assumptions do not apply if they are shown to be incorrect.

It was suggested above that one consequence of *Soering* is that the acceptance and manner of discharge of international extradition arrangements would be affected significantly by ECHR. *Elton* provides some reason to think that this proposition should be widened so as to apply to any international obligation.

Article 5(7) of the 1988 UN Drugs Convention provides explicitly that “each party may consider ensuring that the onus of proof be reversed regarding the lawful origin of alleged proceeds or other property liable to confiscation”¹⁰⁷⁸. The UK is party to that Convention (as is every other Western European country¹⁰⁷⁹). It is possible, given the approach taken by EComHR in *Elton*, that Article 5(7) of the 1988 Convention must be read subject to the qualification that reversal of the *onus* of proof must not be taken so far that it becomes irrebutable. Great care must be taken not to overstate this point, however. First, the 1988 Convention provision is permissive and so States which are party to both ECHR and that Convention are not faced with conflicting obligations. And secondly, of course, EComHR did not actually consider the interaction of Article 6(2) ECHR and Article 5(7) of the 1988 Convention provision. Nevertheless, it is suggested, in light of the fact that in *Soering* ECtHR did not regard the UK’s extradition obligation as a sufficient justification for action which would breach Article 3 ECHR, it would be correct to approach Article 5(7) of the 1988 UN Convention on the basis that it would not offer protection to a State Party to ECHR which made the reversal of *onus* irrebutable.

Conclusion

By contrast with extradition and mutual legal assistance, there is no necessary international element to proceeds of crime law; though in practice the frequency with which money laundering has a transnational dimension justifies the interest

¹⁰⁷⁸ Art 5(7).

¹⁰⁷⁹ Second Commission Report to the European Parliament and the Council on the implementation of the Money Laundering Directive, COM (1998) 401 final, Annex 3.

taken in the subject by the international community. That practical transnationality is and always has been reflected in the definition of “drug trafficking”. That being so, the delay in putting the confiscation Order in Council in place is disturbing.

Although there has been very substantial activity on the international plane in relation to proceeds of crime, it is suggested that it is established that the influence which the international instruments have had on UK or Scots law is limited. The development of proceeds of crime law in Scotland until the 1995 Act was clearly driven by domestic considerations. In the work which led to the 1995 Act, the Scottish Law Commission proceeded deliberately under reference to the international instruments but its conclusions on the basis of the international instruments did not lead it to any recommendations which varied significantly from the existing structure of the law. Indeed this pattern continues. The Home Office Working Group on Confiscation, in its Third Report¹⁰⁸⁰, has recommended that forfeiture of criminal proceeds should be available by civil process. No international instrument requires that to be done.

In terms of the relationship between international law and criminal law, then, proceeds of crime law can only tell us a limited amount. We can say that the UK has been prepared to participate with some enthusiasm in international initiatives which fit well with its national law and policy. Indeed, we can also say that the UK has on a number of occasions seen in international or European instruments an opportunity to extend its law and has done so beyond what is required by the international or European instrument.

¹⁰⁸⁰ *Supra*, n1025.

6. CONCLUSION

This thesis has examined selected (but illustrative) aspects of the law in which there arises a relationship between international law and criminal law. The first and most obvious conclusion that may be drawn about the relationship between international law and the criminal law of Scotland is that it is not merely substantially unexplored. It is also underdeveloped. It would have been impossible to write the municipal law parts of this thesis under exclusive reference to Scottish material, even if it had been desirable to do so. More significantly, it has been impossible to write those parts of the thesis under *primary* reference to Scottish material. It would be too easy to blame this on the pervasive anglocentricity of UK international criminal justice policy and practice. Although that is undoubtedly a factor, it is by no means the only one. The simple truth is that (with a few individual exceptions) no section of the legal community which might have been expected to contribute to the relationship between international law and Scottish criminal law has so far done very much at all to develop that relationship. Some have, from time to time, done quite a lot to discourage it.

In *Kaur*¹⁰⁸¹ and *Moore*¹⁰⁸², the judiciary closed the door on reference to ECHR and also, because those cases treated of the use of unincorporated treaties in general and simply applied that law to reference to ECHR, on reference to all other unincorporated treaties. Until *T, Petitioner*¹⁰⁸³, the Scottish judiciary showed itself to be much less receptive to international law points in criminal cases than was the English judiciary. In *Muirhead*¹⁰⁸⁴ the Crown, having failed to persuade the sheriff in *Lesacher*¹⁰⁸⁵, was successful in obtaining from the High Court a highly restrictive approach to section 32 of the Criminal Procedure (Scotland) Act 1980, which made provision for the sending of letters of request¹⁰⁸⁶. That attitude

¹⁰⁸¹ *Supra.*

¹⁰⁸² *Supra.*

¹⁰⁸³ *Supra.*

¹⁰⁸⁴ *Supra.*

¹⁰⁸⁵ *Supra.*

¹⁰⁸⁶ See 154.

reflected the attitude of the government of the day which, in enacting the provision, had made it clear that it anticipated that it would be used only in relation to relatively formal matters¹⁰⁸⁷. Scottish criminal justice policy has, of course, been a matter for the Scottish Office and it could not be said that that Department has been quick to pursue international criminal justice issues. The delay until May 1999 in getting the Confiscation Order into place¹⁰⁸⁸ is only one illustration of that. More generally, one wonders whether the pervasive anglocentricity of UK international criminal law policy has been either inevitable or wholly the fault of the Home Office.

Scottish solicitors and advocates have shown little inclination to take international (or even European) law based points in criminal cases and those they have taken have sometimes been sadly misconceived¹⁰⁸⁹. The right of individual petition under ECHR has been available since 1966 but the legal profession in Scotland has been rather slow to make use of it¹⁰⁹⁰. This has been at least as true of criminal law practitioners as of the profession in general. It may be recalled that, notwithstanding the considerable relevance of ECHR to criminal law, *T, Petitioner*, in which the law was finally changed so as to permit reference to ECHR, was a civil case before the Inner House of the Court of Session.

Nor have most Scottish academics been especially industrious in pursuing the Scots law aspect of international criminal law. Some high quality work has been published but it has been infrequent and has focussed on a limited range of issues.

In the result, although some of the particular rules of Scots law differ from those of English law (for example, as to the availability of search and seizure in pursuance of a foreign investigation in connection with which proceedings have not been commenced¹⁰⁹¹) it cannot be said that Scots law has developed a

¹⁰⁸⁷ *Ibid.*

¹⁰⁸⁸ See 299.

¹⁰⁸⁹ See, for example, *Jardine v Crowe* 1999 SCCR 52.

¹⁰⁹⁰ See Jim Murdoch, "The Human Rights Dimension" (1999) 44 JLSS 20.

¹⁰⁹¹ See 201.

relationship with international law which is materially different in principle from that between international law and English law. Indeed, one consequence of *T, Petitioner* was to elide a difference between the respective relationships of Scots and English law with international law. One may speculate that the advent of the Scottish Parliament with legislative competence over criminal law and procedure might open the possibility of divergence but, since the key areas of foreign affairs, money laundering, proceeds of crime so far as it relates to drug trafficking and extradition are all reserved matters¹⁰⁹² one should, perhaps, not hold one's breath. It is entirely possible that the Scottish Executive, lacking any *locus* in foreign policy, will give little attention to international criminal justice policy and that Whitehall, lacking any responsibility for the development of Scottish criminal law, will marginalise it even more than at present in international negotiations. The handling of the UK position during the negotiation of the projected UN Convention on Transnational Organised Crime might be illuminating.

Some Scottish representation in European Union affairs seems to be in contemplation¹⁰⁹³ and, since Europe has provided the context within which significant parts of the development of UK international criminal justice policy have taken place, it might be that there will be some departure from the practice whereby the relationship between Scots law and international law is conducted by proxy; but that remains to be seen. For the time being, one requires to understand the relationship between international law and Scots law in very similar terms to the relationship between international law and English law-except that the implementation of international law in Scotland is rendered more difficult than it need be by the common habit of negotiating treaties with an exclusively English law frame of reference and legislating in primarily English legal categories¹⁰⁹⁴. The uncertain grasp which policy makers seem to have of aspects of both national and

¹⁰⁹² Scotland Act 1998 Schedule 5 Part I para 7 and Part II para 3 sections A5, B1 and B11.

¹⁰⁹³ It is understood that a protocol for dealing with the Scottish position in European affairs is under discussion between the Scottish Executive and Whitehall.

¹⁰⁹⁴ See P Robinson, "Treaty Negotiation, Drafting, Ratification and Accession by CARICOM States", especially at 3-4, on the desirability of having present at negotiations a lawyer conversant with the domestic legal context in which the treaty will have to operate.

international law does not assist.

Just as it would be too easy to blame the underdevelopment of the relationship between international law and Scots criminal law on anglocentricity, so it would be too easy to characterise the relative lack of engagement of Scottish actors in international criminal law matters as a manifestation of parochialism or unreflective separatism. It is suggested that the shortage of material on international criminal law from a Scots law perspective in fact reflects the approach taken by successive UK governments to international criminal justice policy more generally. Until the middle 1980s, although the UK did participate in multilateral criminal law treaties, it saw no particular need to co-operate in international criminal justice matters¹⁰⁹⁵. Although the dualistic approach to the general relationship between international law and municipal law was developed by the courts, it is clear enough from comments made by the UK government in international *fora* that it was content with that position¹⁰⁹⁶. There was a barrier between international law and municipal criminal law and successive governments left it in place. Even now, notwithstanding the fact that in the middle 1980s the UK decided that international co-operation had become a matter of necessity¹⁰⁹⁷ and began to pursue active involvement in international criminal law, it remains true that municipal criminal law has priority.

That priority follows from the fact that (with the exception of peremptory norms, which do not concern us) the content of international law is very largely within the control of states¹⁰⁹⁸ and the rule, developed by the courts, that the sovereign power of the Queen in Parliament extends to breaking treaties¹⁰⁹⁹.

As to control over the content of international law, it is clear that customary norms are not opposable to a state which has consistently objected to

¹⁰⁹⁵ See 36.

¹⁰⁹⁶ See 18, n37.

¹⁰⁹⁷ See 76-77.

¹⁰⁹⁸ Antonio Cassese, *International Law in a Divided World* Clarendon Press, Oxford, 1986, 169-199.

¹⁰⁹⁹ *Salomon*.

them¹¹⁰⁰. It is also clear (as a matter of the definition of a treaty as an agreement, apart from any other consideration) that no State can be obliged to participate in a treaty. Control over the content of criminal law is typically regarded by states as a matter of sovereignty and tends, therefore, to be guarded jealously¹¹⁰¹. No state regards itself as being under any obligation to accept any criminal law rule developed by the international community. On the contrary, states may be expected to show significant resistance to anything which they perceive as external interference in their criminal law. The UK's attitude to the requirement in the Proposal for the Money Laundering Directive that money laundering should be criminalised is illustrative of this. Notwithstanding the fact that such criminalisation was a policy to which the UK was firmly committed, it will be recalled that Mr A Harding of the Home Office, giving evidence to the House of Lords Select Committee on the European Communities on the subject, invoked the concept of sovereignty and said that the UK would be "very concerned" if such a precedent was set¹¹⁰². The UK's determination to control the content of its international criminal law obligations is, of course, further illustrated by section 4(2) of the 1989 Act, which requires that international extradition arrangements should conform to the statute.

By accepting an international obligation with which existing domestic criminal law is inconsistent, a state commits itself to changing that criminal law. Its willingness to accept such obligations must therefore (and obviously) depend in large measure on its willingness to change its criminal law. The critical question will always be how anxious a state is, as a matter of policy, to achieve the objective of the treaty in question. We have noted above the attitude which the UK took to the negotiation of the extradition provisions of the 1988 UN Drugs Convention. Notwithstanding the fact that those provisions did not precisely reflect the UK's traditional approach to extradition, the UK's desire to attack

¹¹⁰⁰ Brownlie, *op cit*, 10.

¹¹⁰¹ See Christine Van den Wyngaert, "Foreword" in Christine Van den Wyngaert (and others) (eds) *Criminal Procedure Systems in the European Community*, Butterworths, 1993, i.

¹¹⁰² See 276.

transnational drug trafficking was strong and may be seen as contributing to the UK's supportive attitude to the draft of the Convention. Still more telling, perhaps, was the UK's decision to abandon the *prima facie* case requirement, to which it had been heavily attached. It is clear that this step was taken because the UK attached an even higher priority to its wider aim of attacking international crime.

The major overhaul of UK extradition and mutual assistance legislation between 1988 and 1990 may be explained in a similar way. It had become clear that the uncompromising anglocentricity of the UK's extradition law and practice was a "stumbling block" to the UK's wider policy objective of attacking transnational crime¹¹⁰³. An absence of mechanisms for the provision of mutual assistance by the UK was causing "serious problems" for UK prosecution authorities who were trying to secure assistance from other jurisdictions. Under these imperatives, the law was changed. Although the UK wished to preserve so far as possible what it regarded as its own legal traditions (as the 1982 Working Party on Extradition said in terms), its priority was the attack on transnational crime.

That priority is not, however, absolute. The European Union Convention on the Establishment of a European Police Office¹¹⁰⁴ ("The Europol Convention") is the only Third Pillar convention which has entered into force. Under it, there is no role for the European Court of Justice. Germany and the Benelux countries thought it reasonable to have the activities of Europol subject to ECJ scrutiny but although the UK was heavily committed to the attack on transnational crime it considered that policing and criminal justice are for Member States alone and not for the EC institutions. Feelings ran so strongly on the ECJ issue that it looked at times as though it might derail the whole Europol project. In the event, the problem was dealt with in a protocol, which enabled Member States to accept the jurisdiction of the ECJ to give preliminary rulings on the interpretation of the

¹¹⁰³ See 76.

¹¹⁰⁴ OJ 95/C 316/2.

Europol Convention¹¹⁰⁵. All of the Member States except the UK have now done so. As regards the UK alone, therefore, the Europol Convention has entered into force without any role for the ECJ.

The critical issue in all cases will be the balance of priority between the UK policies which are affected. In the case of Europol, it is evident that the UK took the view that national sovereignty as it applied to policing and the risk which acceptance of the jurisdiction of the ECJ is perceived as posing to that sovereignty outweighs its undoubted commitment to attacking transnational crime.

The future is uncertain; but it does seem probable that it will be the UK's involvement in Europe which will be the single most important influence on the relationship between international law and Scottish criminal law. We have noted the UK's preference for the Third Pillar of the EU over the First¹¹⁰⁶ and also the public international law character of the Third Pillar¹¹⁰⁷. In the context of fraud on the EC budget (a transnational crime which costs upwards of £5.5 billion per year¹¹⁰⁸) the UK Government has placed great stress on completion and ratification of Third Pillar instruments¹¹⁰⁹. One of the things which is clear from the foregoing study is that European complaints about the UK's isolationist approach played a significant part in the change in the UK's attitude during the mid to late 1980s. It is also clear that Council of Europe and EU instruments have played a large part in the development of current UK international criminal justice policy. But there are limits. The Home Office continues to stress the importance of national sovereignty¹¹¹⁰ and there is no reason at present to suppose that the Government is considering changing that position. That being so, municipal law seems likely to retain its priority.

That priority is, of course, much modified from the isolationist attitude

¹¹⁰⁵ OJ 96/C 299/2.

¹¹⁰⁶ See 92.

¹¹⁰⁷ See 88.

¹¹⁰⁸ House of Lords Select Committee on the European Communities, *Prosecuting Fraud...*, 7.

¹¹⁰⁹ *Ibid*, 98.

¹¹¹⁰ House of Lords Select Committee on the European Communities, *Prosecuting Fraud...*, 99, para 297, evidence of Kate Hoey, Parliamentary Under-Secretary of State at the Home Office.

which characterised UK international criminal justice policy (if one can call it a policy) until the middle 1980s. Extradition and mutual assistance law have been substantially recast and the UK has made it clear that it intends to engage actively in international criminal justice matters in the future. The Government's agenda for the immediate future was made clear to the House of Lords Select Committee on the European Communities in a Home Office memorandum as recently as 24 March 1999¹¹¹¹. The Government proposes the development of the concept of the mutual recognition of court decisions, which "might in due course lead to fast-track extradition (similar to backing of warrants); abolition of dual criminality restrictions on extradition and MLA requests; and the ability for member states to freeze suspect assets and certain types of evidence more quickly to prevent their being dispersed". The paper submitted by the UK to the K4 Committee in March 1999 notes that public opinion is not always ready to accept that the procedures of other member States are equivalent to their own and that governments will have to inform and educate public opinion¹¹¹². The clear implication is that the UK Government does accept that it is possible to have confidence in the criminal justice systems of other EU countries. We have come a long way from the attitude described by Harding¹¹¹³.

The position at which we have arrived is this: the relationship between international law and Scots criminal law is underdeveloped. Whilst there is a Scots law dimension to the relationship between international law and criminal law in the UK, the principles have been developed primarily in the context of English law. In general, priority lies with municipal law but the UK has shown itself willing to change municipal law and even to depart from principles which English law has long cherished where the international obligation which is under consideration for acceptance pursues a policy objective to which the UK government at the time attaches particular priority. This, it should be said, contradicts the tendency which the UK has shown in the past to assume that its

¹¹¹¹ House of Lords Select Committee on the European Communities, *Prosecuting Fraud...*, 98.

¹¹¹² Para 14.

traditional approach to matters such as criminal jurisdiction and the *prima facie* case requirement reflects fundamental legal principle; though the UK has not been so accommodating as (for example) Holland, which has embraced mutual assistance sufficiently thoroughly to legislate for evidence to be taken according to the procedures of the requesting State¹¹¹⁴ and international human rights sufficiently thoroughly to legislate for the refusal of extradition if procedure in the requesting State is contrary to ECHR¹¹¹⁵.

In *United States v Jamieson* it was said that ministers dealing with extradition must consider comity, reciprocity, treaty obligations and national security interests¹¹¹⁶. Much the same is true of international criminal law as a whole. Although one may identify dualism and the consequent need for the legislative transformation of treaties as fundamental to the relationship between international law and municipal criminal law, not even these principles are immutable. The relationship between international law and criminal law in the UK, including the criminal law of Scotland, is not, in the final analysis, a matter of legal principle. It is, rather, a matter of the working out in the law of political priorities. One may identify and describe trends in the relationship but the conclusion must be a positivist one. There are no immutable principles. The relationship between international law and the criminal law of Scotland is entirely a matter of Governmental choice as expressed in treaties and legislation; no more and no less.

¹¹¹³ See 150 above.

¹¹¹⁴ See 164.

¹¹¹⁵ See 70 n239.

¹¹¹⁶ See 35.

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